THE FREEMAN

IDEAS ON LIBERTY

Real Purchasing Power

Supermarket Myths

The Liability Crisis

The Irish Potato Famine

JANUARY 1987

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THE FREEMAN

IDEAS ON LIBERTY

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PERSPECTIVE

The Power of an Ideal

Anything that's peaceful. A fair field and no favors. No man-concocted restraints against the release of creative human energy.

These are the words Leonard E. Read used to describe his ideal of a free market, private property, limited government order. And this is the ideal to which The Foundation for Economic Education remains steadfastly dedicated.

But the real world is far from ideal. Markets are regulated, private property is violated, and government is frequently used, not to protect people from fraud and coercion, but for personal gain and special interest plunder.

The Foundation, it would seem, is out of touch with the real world. Our idealism, it can be argued, is a luxury which men and women of practical affairs can ill afford. It will only get in the way.

But if we pause to reflect, we see that idealism—standing ramrod straight for liberty—by no means prevents us from reaching practical goals. In fact, a principled stand for liberty may be the only way to attain the kind of society any of us—or our children—would want to live in.

Consider the following:

I. *Idealism is goal-oriented.* In our case, we constantly strive for a free society, although we are well aware that, in the foreseeable future, our ultimate goal remains out of reach. Such a clearly defined goal is our greatest asset, especially when things don't seem to be going our way. We know where we want to go and will not be swayed by compromise or political expediency.

2. *Idealism is energizing.* The ideal is worth working and sacrificing for. When the ideal goal is far from the everyday reality—as in the case of the freedom ideal—the student of liberty doesn't despair. His ultimate goal isn't tomorrow's Congressional vote or next year's election. He is striving to work on the highest possible plane—his own understanding and exposition of the freedom philosophy. Self-improvement along these lines is a full-time job.

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There is no time to be disheartened when the political winds seem to blow against us. Self-improvement is enormously satisfying. And it is fun!

3. *Idealism is attractive.* It gains adherents who yearn for something more than pragmatism, compromise, and expediency. Our experience at FEE has shown time and again that the people who go on to work the longest, hardest, and most effectively for freedom are precisely those individuals who have been attracted by the purity of our message.

4. *Idealism works.* Combine a clearly perceived goal, a constant striving for self-improvement, and the energetic adherents this striving attracts, and you have a powerful force which will not be swayed from its ideal. In the long run, this is the only way anything worth having has ever been attained.

—BJS

Foreign Debtors

U.S. banks hold more than $240 billion in foreign debts. What are the prospects of these debts being repaid? Recent developments in the loan markets may provide an answer.

Since 1982, when the international debt crisis first made headlines, New York and London brokers have been quietly trading portions of these debts in a secondary market. This market has now grown to where we can get an idea of the true value of these loans.

If traders are completely confident that a debt will be repaid, it will trade at book value —100 cents on a dollar. But many foreign debts are trading at much less than book value. Argentine debt, for example, is offered at 67 cents on the dollar. Mexican debt stands at 62 cents, Polish debt at 53 cents, Peruvian debt at 24 cents, and Bolivian debt at a paltry 8 cents.

As with any other market price, these figures vary with time and changing expectations. But with traders putting their money on the line, the secondary market for foreign debt may be the best gauge of debt serviceability.

—BJS

A Man's Home . . .

No one is really responsible for collectively owned property; no one cares. So it deteriorates. Individuals who own property do care because they know they are responsible. A recent visitor to the home of his ancestors in East Germany pointed to the contrast in an article in *The Wall Street Journal.*

He described the fate of that small East German town under the communist regime. The old castle, once a "stately mansion" surrounded by lavish park and flower gardens, was in shambles, with spider webs, wallpaper peeling, window sills covered with dust and dead moths, its garden overgrown. There was a state-run grocery store on the old castle's first floor and people were living in its nooks and crannies. "The neighborhood that belongs to all," this observer wrote, was "dingy and chaotic; chickens, ducks and rabbits run wild around the muddy streets and run-down houses."

The residents' private homes presented a sharp contrast. "[I]nside the homes, the private castles of the people, . . . pride and responsibility thrive. . . ."

When property is collectively owned, no one cares. When property is privately owned, the owners care; they are willing to "go that extra mile" because they know they are responsible for it.

—BBG

Liability Crisis

"Thousands of patients with rare neuromuscular disorders are suffering renewed contortions of the eyes, face, neck and other parts of the body because their supply of experimental medicine was cut off when its only manufacturer was unable to obtain liability insurance."

This item, from the October 14, 1986 issue of *The New York Times,* is indicative of the frightening trend in liability coverage. What is the cause of this crisis? Is there a cure? See Ridgway K. Foley's penetrating analysis which begins on page 12.

—BJS

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THE FREEMAN
IDEAS ON LIBERTY

Supermarket Myths

by Melvin D. Barger

Growing up in Norfolk, Nebraska, in the 1930s, I heard my elders voice a number of economic myths which were part of the populist folklore.

We heard shocking reports about the big oil companies who had bought up and suppressed the carburetor that would deliver 100 miles to the gallon. There were also sinister hosiery manufacturers who withheld silk stockings which would last a lifetime. And we felt deep rage when we heard that nine powerful men on Wall Street met every weekday morning to decide the nation's economic affairs for that day.

The threats posed by grocery chain stores were part of that folklore. Safeway Stores, the most successful of the four grocery chains operating in our town of 10,000, was the most feared of the group. There were also about 40 independent and neighborhood grocery stores in the city. Their proprietors warned us of the grim fate that lay ahead as a result of Safeway's growth and expansion.

A typical comment about Safeway would go like this: "Sure, Safeway offers good merchandise at low prices. But you just wait! With their size and profits, Safeway can drive us little fellows to the wall anytime they want. Then watch out! They'll get together with the other chain stores and charge any prices they choose." This dire warning might be followed by a grumbling comment that the government should do something to curb the power of giants like Safeway.

But a funny thing happened to upset this grim scenario for Norfolk. *Safeway isn't there anymore!* It bit the dust in 1982 as part of the company's shutdown of its Omaha Division. And none of the other chains that operated in Norfolk in 1936 is still in business in the community! Yet Norfolk has almost doubled in population since the mid-1930s and enjoys a prosperity brought on by decades of improved farming and the development of manufacturing. Why could Safeway and other chains survive in the community during those bleak Depression years and then be forced to shut down in a later time of affluence and growth?

During a recent visit home, I discussed the Safeway closing with several people, including the independent proprietor who took over Safeway's building. My conclusion is that Safeway and the other chains came to grief because of market forces in the food business—the very forces that were supposed to be the chain stores' principal advantages. While it may have seemed to my elders that the chains had invincible power, they were never as strong as they appeared to be. And some of their strengths also became serious liabilities in later years.

One of Safeway's supposed advantages was its leverage as a volume buyer. With centralized purchasing serving a large number of stores, it could obtain price advantages that simply were not available to the small grocer. I

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can even remember neighborhood store proprietors telling me that certain Safeway *selling* prices were below their own *costs* for the same items.

While small outlets may always have this problem, it was not the same for larger independent markets in Norfolk which were competing directly with Safeway. Thanks to the rise of the food wholesalers and other organizations which perform buying and warehousing for large numbers of these independent stores, the chains' advantage in this area was soon blunted. The independents also turned out to be resourceful competitors by pooling their advertising efforts. Independent grocery retailers learned, too, that there was some advantage in being locally owned although connected with a larger buying organization. While this was probably not a large factor in sales, it was a way of trading on the natural resentment townspeople had toward absentee owners.

Union vs. Nonunion

Another fact my elders failed to understand in the 1930s was that "bigness" creates certain costs and problems which independent operators can sometimes avoid. One of the key points in Safeway's closing of its 67-store Omaha Division was the competition from "nonunion" stores in the area. Translated into more understandable terms, this means that aggressive union action had driven Safeway's costs up so high that the company found itself unable to operate profitably and was disadvantaged because independent supermarkets in the same area had lower labor costs.

In fact, however, unionization is one of the risks of bigness. Unions, despite the ideals they profess to the public, will devote far more time and effort to organizing a large company than they direct to a small one. For the union, it is much more financially rewarding to organize a large chain grocery with many outlets than to organize a single independent store with only 40 or 50 prospective dues-paying members.

Union officials representing retail grocery clerks would prefer a tidy world which would see all supermarkets in a single area being forced by government edict to operate under a union banner. The very presence of nonunion stores acts as a check on union demands. Editorializing in his union's magazine, President William H. Wynn of the United Food and Commercial Workers noted: "Our contracts are, to a large degree, dependent on our success in organizing. In retail food, for example, our contracts are best in those geographic areas where virtually every grocery store employs UFCW members. Therefore, with all employers paying similar labor costs, then stores must compete on the basis of managerial ability, efficiency and customer acceptance, rather than by trying to squeeze profits out of their employees." (*UFCW Magazine,* March-April 1986)

While Mr. Wynn thinks standardized pay is a great idea, this is not the way the market works and it is not the best way to serve either the customers' or the store employees' interests.

While a nonunion supermarket owner may appear to be "squeezing profits" out of his employees, he may also be assuring the workers of long employment. The Safeway workers who lost their jobs with the closing of the Omaha Division were not helped in the long run by union pressures which forced their wages up to a level the general market would not support.

The union argument is that nonunion employees are used to whipsaw those who belong to unions. The lower wage worker is called a "scab." But the flip side of this argument is that persons who want to work in supermarkets are often excluded from employment by union contracts and arrangements which give the current employees of the firm an unusual advantage (no matter how poorly they are performing). But a wage that appears low to one worker may be very attractive to another whose needs and aspirations may be different. Rather than condemning persons who work at lower wages than the union scale, we should applaud them for working and for bringing needed corrections to a market situation that has been distorted by excessive coercion.

Another myth about Safeway stemmed from "awe of the expert" which sometimes afflicted business people in small towns. The large chain stores like Safeway supposedly had teams of management "experts" at corporate headquarters who outclassed the small, independent

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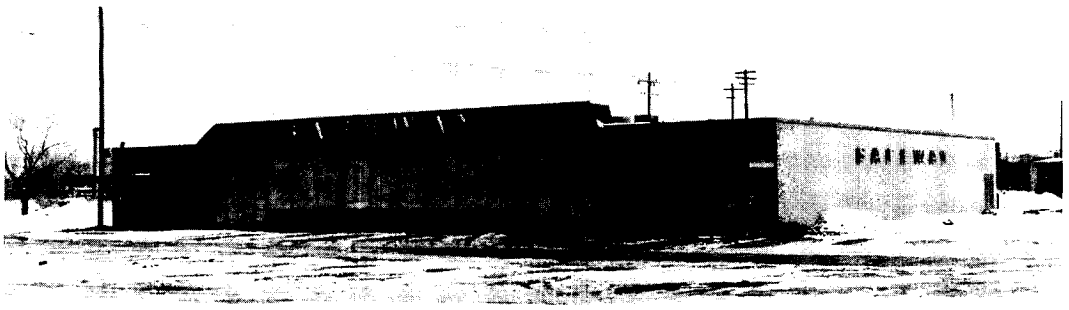

The Safeway store, Norfolk, Nebraska, 1969.

proprietors in our hometown. It was believed that the local proprietor was too busy "running the store" to take note of long-term trends and developments which were necessary for the survival of the business.

In fact, however, the independent grocery store proprietors in Norfolk were more attuned to the demands and needs of their own market than anybody at a grocery chain headquarters ever could be. The independent proprietor who works long hours in his own store still might be the most cost-effective manager in the business. A typical owner-manager in Norfolk could be found almost anywhere in the store, helping out in the meat market, supervising an unloading on the dock, or working at the checkout. It is an intensive form of business management that results in clean stores, good merchandise, fast service, and low costs and prices. Best of all, a proprietor who works in this manner also is constantly keyed in to the performance of other store employees and how well they are serving customers. Owner-managers who worked this way in Norfolk kept their own costs under control and managed to stay competitive with Safeway and the other chains.

But these independents were larger grocery stores which stocked numerous items and sought high volumes; they were early supermarkets. Also scattered about the town, several blocks apart, were about 30 neighborhood stores—small establishments run by families who lived in rooms above or behind the store. And another of the myths we heard in the 1930s was about the importance of the neighborhood store. Something important was going to be lost, we were led to believe, if these neighborhood stores went out of business.

But as I found on my recent trip home, the small neighborhood stores from the 1930s have disappeared from Norfolk. They actually began to disappear during World War II and in the years immediately following. But it wasn't perfidious price competition from Safeway that did them in. Most of the neighborhood stores I remember were marginal businesses and wouldn't be very attractive to us today. They have been largely replaced by the convenience stores with names like 7-Eleven and Mister G's Mini Mart.

The Neighborhood Store

In the 1930s, we lived next door to a small neighborhood store operated by a man named Bob. Bob and his wife lived in a small room or two at the rear of the store. They were friendly, kindly people, but I know today that their store probably made them very little beyond a small living. It existed largely because most people used it for convenience items like bread and milk, where Bob could usually be competitive with the larger stores. He also kept a barrel of kerosene because many people in the neighborhood used this fuel for kitchen stoves.

But Bob's prices for meats, canned goods, and other processed foods were usually much higher than at the downtown chain or independent stores. He was so much a part of the neighborhood, however, that my mother felt guilty about shopping downtown. When we returned from a downtown store carrying grocery sacks (we had no car), we would come in

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through the backyards so Bob and his wife would not see us. As young people would say today, Bob managed to lay a guilt trip on us! It was all part of the populist folklore—the belief that we were somehow betraying our friends and neighbors by shopping at Safeway.

As we know, increased ownership of automobiles put Bob and other neighborhood stores out of business—but most of them went on to higher paying employment in another field. As for the convenience stores that replaced them, we are more realistic about their role than we were about the neighborhood store. If a 7-Eleven operates in our neighborhood, we no longer feel guilty about shopping elsewhere for better prices on our larger purchases!

Although Safeway had to quit the community in 1982, it did have a long run in Norfolk. It was successively in four different locations in the city, each an improvement over the previous one. The Norfolk Safeway store in the late 1930s was larger and more efficient than any store in the city, and it attracted considerable business from farm families who could bring eggs there in exchange for other food products. Although the Safeway store of the 1930s would be outmoded by today's standards, it forced the other stores to improve and upgrade their facilities. And Safeway, which battles with Kroger for eminence in the food business nationwide, continued to upgrade its Norfolk facilities and was occupying a new 19,000-square-foot building at the time of its closing.

Viewed as a threat in the 1930s, Safeway was actually a public benefactor because it set a standard which the other stores had to match—and would eventually surpass. But it is ironic that Safeway was the pacesetter in Norfolk during the depressed 1930s and faltered during a much brighter era. At the time of the Norfolk closing, Safeway Stores Inc. had consolidated sales of nearly $20 billion and operated about 2,500 stores. What went wrong?

According to Safeway's 1982 Annual Report, the closing of the Omaha Division was to carry out a company objective of divesting operations with poor prospects so assets could be deployed into areas with a greater potential return on investment. *Business Week* (April 5, 1982, p. 109) noted that the division had chronic losses and the region had limited population growth and increasing numbers of non-union stores. Safeway also left the Memphis market at the time of the Omaha Division closing and had left the New York City market 20 years earlier. These explanations make sound business sense and Safeway, at this writing, is apparently following strategies which will help it maintain its position as one of the world's largest grocery chains. It will probably continue to do well in many markets as it builds new stores and expands into more profitable lines.

But Safeway's performance record in Norfolk shows that it never had the power to monopolize the market, it never was in a position to set prices of its own choosing, and it was never more than a few steps ahead of its independent competitors in the city. And with its corporate overhead and general policies, it could not be profitable in markets like Norfolk where other retailers continue to make a good living.

In the light of what actually happened, the 1930s myths about Safeway and its vaunted powers over the market seem quaint today. But are they really so quaint? While I was in Norfolk recently, an independent supermarket owner voiced grave concern about the market strength of another chain competitor that is having considerable success in the region. I also heard concern expressed over the shakeout which may reduce the total number of food wholesalers to about ten.

My own feeling is that market forces in the retail grocery business have served the public well and will continue to bring needed changes as we require them. Our interests will be served if we let stores compete freely and if we don't fear or penalize the successful supermarket operator.

But I know that myths die hard. A few years ago, I heard a college graduate say that the big oil companies had bought up and suppressed a carburetor which will deliver 100 miles per gallon. Others have said that hosiery manufacturers design their products for short life, only now it's panty hose instead of silk stockings. And I still hear now and then about those nine old men on Wall Street who control our economic destiny! □

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Real Purchasing Power

by Bill Anderson

One recent afternoon I took my daughter to a movie. The tickets cost a total of $5 and to pay for them, I pulled a $10 bill from my wallet. As any economics professor could have told me, I held $10 of purchasing power. Since I could not resell the tickets once I had bought them, my purchasing power was reduced to $5.

A trip to the concessions stand further reduced my purchasing power to slightly above $2, which might be used for buying more snacks. When that money is spent, providing my coffers are not replenished, my purchasing power will be zero.

And so the cycle continues. I receive a paycheck, save some of it, and spend the rest. The size of that paycheck determines what I may purchase and what quantities I can buy. It would seem, then, that my purchasing power is derived from the amount of money printed on my paycheck. So it seems, but like so many other popular notions of economics, this idea is based on fallacy.

Henry Hazlitt writes in his classic *Economics in One Lesson* that "economics is haunted by more fallacies than any other study known to man." This is not due simply to a lack of education, but is caused primarily by the presence of many conflicting special interest groups.

Consider a common fallacy—"the blessings of destruction." We encounter this, in one form or another, following every war or natural disaster. For example, after Hurricane Alicia struck Galveston, Texas, in 1983, one news reporter declared that the cloud of destruction had a silver lining: the cleanup after the storm would create many jobs. Furthermore, the newly hired workers would then spend their paychecks, bringing untold benefits to the community.

If this sounds familiar to students of liberty, it is: Frederic Bastiat exposed this fallacy in his brilliant satire of the broken window. In Bastiat's example, a hoodlum who threw a brick through a shop window was hailed as an economic benefactor because he created work for the local glazier. In the case of Hurricane Alicia, many glaziers, tree surgeons, electricians, carpenters, and others were hired to clean and restore businesses and homes. In each case, workers received purchasing power, a large part of which was then spent.

But in each situation, we must remember that the principal spenders (property owners and insurance companies) before the incidents had not intended to spend their money on glaziers and electricians. They had other plans for their money—plans which would have involved their own spending, saving, and investment decisions. The money which was spent on repairs would have been used elsewhere. Spending money on repairs creates no net gain in wealth or employment.

Both the news reporter and the crowd gathered outside the shop's window saw only a part of the economic picture. More importantly, they failed to understand the source of pur-

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chasing power. And while the reporter's economic illiteracy may border on the humorous, we must bear in mind that many government economic policies are based on such false assumptions.

Government spends money which goes into someone's hands. The money is then spent, and jobs are supposedly created. Few people pay attention to where the money comes from, or what the money would have done if it hadn't been taxed and spent by government.

Of course, government, in its attempt to create "purchasing power," doesn't blow a hurricane onto our shores or heave bricks through our windows. But it brings economic destruction all the same.

Wealth—The Government Way

Ever since the Great Depression of the 1930s and the New Deal, it has been assumed that government is a net creator of wealth and employment. From the Civilian Conservation Corps to the Works Progress Administration to the Tennessee Valley Authority, Federal officials set up "Alphabet Soup" agencies to hire unemployed workers and, supposedly, "prime the pump" of the national economy through increased spending.

It was commonly assumed by economists of the day that the Great Depression was caused by "underconsumption" or "over-saving." According to John Maynard Keynes and others, the U.S. economy in the 1920s grew faster than workers' wages. Thus, the Keynesians believed, workers were unable to "buy back the products" they had manufactured.

The solution to this problem seemed simple: place more money in the hands of ordinary workers, who would then buy the products they had originally created. In other words, the answer was to give the workers more "purchasing power." The means to pay for such largess was to come in one or more of three ways. The first was to tax those with "excessive" incomes and transfer that money to those with lower incomes. The theory was that those in upper-income brackets would save too much; by transferring that "excessive" amount of money that would have been saved to poorer persons who would spend those funds, the economy supposedly would be given a shot in the arm.

The second way to boost spending was by simply creating new money through the Federal Reserve System and funneling it to individuals deemed most in need. Their increased spending would then force up prices, decreasing the value of existing money and discouraging savings. Thus the rich would be kept from "oversaving" either by direct confiscation of their wealth or by eroding it through inflation. In this way, it was alleged, the overall economy would receive a net benefit.

The third way involved unionization of the American work force. It was believed during the 1930s that increasing wage rates through unionization of American workers would increase their purchasing power. Thus, Congress passed a series of laws in the 1930s that encouraged the formation of labor unions, and by 1953, more than a third of the U.S. work force was organized. On top of this, Congress enacted minimum wage legislation as well as laws that shortened the work week.

Results of the Experiment

For four decades after the New Deal, transferring wealth was the soul of national economic policy. Income tax rates rose as high as 94 per cent, while inflation came on in waves, climaxing in 1980 at nearly 14 per cent. It would seem that the Keynesian experiment, given these statistics, would have proven successful.

But real increases in personal income (adjusting for inflation), which were at significant levels before the start of the Great Depression, were tailing off badly by the end of the 1960s, as the United States began a decade of economic chaos. And even counting the latest economic recovery, which began at the end of 1982, the average American has barely been able to keep pace with inflation, while many of those in low-income brackets have lost ground.

In the past, a seven per cent unemployment rate would have been cause for alarm; today, seven per cent unemployment is considered to be close to "full employment." In economics, as in American social mores, what was once considered scandalous has now become accept-

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able. At the same time, the once-vaunted industrial base in this country has deteriorated, and production facilities that once employed thousands of people and supported whole communities now are idle.

At present, there seem almost to be two Americas, one in which people are happily employed and looking forward to the future, the other where there reside large numbers of the poor and unemployed. What makes this situation even more tragic is that so much of the damage was done in the name of giving the poor more "purchasing power." The ironic truth is that real purchasing power—the ability to produce and be productive—has been torn from the hands of those who most need it; the ones who have deprived the poor of that power have been a combination of intellectuals, politicians, and union leaders, all of whom claim that their actions were done to benefit the needy.

The True Source of Purchasing Power

To reverse this disturbing trend, we must expose the flawed economic policy that is based on a false conception of "purchasing power."

So far in this article, I have used the term "purchasing power" in conflicting ways, from simple cash to economic production. Lest this seem confusing, it should be remembered that many people mistakenly assume that money really is the same as production.

To clear up this confusion, we must first show why simple cash does not necessarily equal "purchasing power." This belief is part of the larger fallacy that "money equals wealth," which Adam Smith criticized in *The Wealth of Nations*.

The first rule of money is that it is a *medium of exchange*. It is not the *object* of exchange, as many people seem to assume. The role of money is to facilitate the indirect exchange of goods and services, as opposed to barter where exchanges are direct. Within any economy, real exchanges always involve the trading of goods and services.

We gain support for this analysis when we examine economies in which public confidence in the currency has broken down. An excellent example is Chile in 1973 during the hyperinflation brought about by the policies of the Allende government. When the Chilean *escudo* began to depreciate catastrophically, the Marxist regime began to impose currency restrictions upon its citizens to keep them from buying dollars on the black market.

Faced with prohibitions and price controls, the Chilean people simply resorted to barter (tobacco, the old standby, became a favorite with traders). While barter brought about certain inconveniences such as problems with storage and handling, it was the only sane alternative to holding the near-worthless Chilean money.

The Chilean government's economic strategy was centered around inflation. First, the Marxist government nationalized numerous businesses. Second, it gave workers in those nationalized enterprises large pay increases and financed the largess with the printing press. Suddenly the Chilean workers whose pay had been far less than that earned by middle-class employees, found themselves at parity with the middle class. The buying spree that followed soon stripped the store shelves; at the same time, production in the nationalized businesses fell drastically. The result was long lines and shortages.

To be sure, the Allende regime had its defenders who claimed that the government's policies had successfully increased the "purchasing power" of Chileans. But what really happened was a temporary transfer of wealth from wealthier Chileans to the poorer ones. The advantages gained by the poorer workers at the beginning, however, were short-lived. With production falling, the quantity and quality of goods Chileans could purchase fell, and continued to fall as the money supply rose. In the end, the poor were as bad off (or worse) than they had been before, while the middle-class workers were devastated. True, the incomes of the poor had reached parity with those above them, but any advantage gained was merely academic; the economy had stopped producing in any meaningful way, leaving Chileans with money in their hands but no place to spend it. Thus, the Chileans resorted to barter.

What does this have to do with purchasing power? The object of economic exchange is to

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obtain goods and services; if the object were simply to obtain money, then Chileans in 1973 would have been among the richest people on earth. Instead, they found that their Marxist government's policies had impoverished them.

As Adam Smith pointed out in *The Wealth of Nations,* the true source of wealth in any economy is the production of goods and services, not the paper money government can crank off the printing presses nor the income it can transfer from one group to another. Wealth is a function of production, period.

Wealth is what people want, be it houses, cars, food, clothing, televisions, computers, or books. Wealth may be a concert, a play, or a walk by the shore. It is whatever one values as wealth.

An individual's so-called purchasing power is measured in the kinds and quantities of wealth he or she can obtain. Yet, one can only accumulate wealth on the basis of production, be it by that person or by someone else. For example, a child may buy candy at a store with allowance money provided by her dad; while the child did not actually produce to earn that money, her father probably did, and his productivity is the source of her purchasing power.

The point is that our ability to purchase goods and services is the direct result of either our own productivity or the productivity of someone else who contributes—either voluntarily or involuntarily—to us. And what is true for individuals is also true for a nation. Our nation enjoys a high standard of living only because we—not to mention our parents and grandparents—are a productive people. Take away our ability to produce, and you take away our "purchasing power."

There is no substitute for production. Printing money only brings inflation, as Chileans found to their sorrow. Taxing one group of persons to give cash to another may transfer abilities to purchase, but fails to produce new goods and services. Raising wages through union activity is just another transfer scheme that takes abilities to purchase from non-unionized workers and gives them to union members.

Yet, our government has transferred wealth for the past 50 years in the name of creating "purchasing power." At the same time, government regulators, operating on Federal, state, and local levels, have imposed millions of rules and regulations on wealth-creating enterprises, not allowing them to produce to their full capacities, thus cutting down on the supply of wealth.

For all the talk of government bringing "fairness" into the economy through its policies of taxation and regulation, it is important to note that such activities do not create wealth. At best, they only transfer wealth; at worst, they destroy it. Such policies create "purchasing power" for some only at the expense of others and, in the long term, diminish the capacity of the economy to produce.

Because the real source of exchange is barter, it follows that increased exchanges (or purchases) can come about *only* when there are more goods and services with which to trade. And that can occur only when production increases. Anything that cuts overall production of goods and services cuts real purchasing power.

Conclusion

In the personal example at the beginning of this article, I gave the impression that my "purchasing power" came from the semimonthly check given by my employer. The truth is, my "purchasing power" comes from my ability to render a service to my employer, who must, in turn, convince his consumers that he is giving them the best value for their money. Thus, my economic future depends on the productive efforts of others as well as my own.

It is the same with all of us. As long as our society produces acceptable goods and services in large quantities, all of us can consume in large quantities. Take away our abilities to produce, and we are denied opportunities to consume.

At its best, government can protect our rights to produce and consume, thus enhancing the prospects for future growth. At its worst, government can work to deny us the fruits of our labors. It is up to us to make sure that government protects our rights. □

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The Liability Crisis

by Ridgway K. Foley, Jr.

An endless chain of crises and revolutions seems to beset the modern world. Currently, attention centers upon a "liability crisis," a remarkably imprecise label for a host of intertwined problems. The issue has not suffered from a dearth of commentators. As usual, the vast majority display little acquaintance with the fundamental issue, its nature, its causes, and its solution.

Proper analysis requires a focus upon the critical inquiry of whether a "liability" crisis exists at all. In order to answer this basic question, one must consider: (1) what conditions are individuals referring to when they fret about a liability crisis; (2) are those conditions malevolent; (3) if so, what actions and ideas cause such events; and (4) what words and deeds will curb those causes and cure the unfortunate results to which the commentators apply the rubric "liability crisis"?

I. THE CONTENT OF "THE LIABILITY CRISIS"

As with many complex conceptual problems, "the liability crisis" most likely conveys a great variety of different thoughts to different people. While it would serve no purpose to identify and explicate every nuance, it does appear appropriate to evaluate the more common concerns perturbing our neighbors who employ the phrase "the liability crisis." What becomes manifest is a scene not unlike the fabled blind men describing an elephant, each seizing that which is most apparent to him and ignoring the important "unseen" aspects of the creature.

Several related fears coalesce to form "the liability crisis." First, more and more personal injury lawsuits are filed each year, employing more and more bizarre theories of recovery. By sheer numbers, these actions tend to clog the court system, resulting in the costs associated with delay, distress, and despair. Second, judges and jurors award substantially higher damage verdicts in more cases, particularly in heretofore unexpected sorts of claims, than ever before. Third, producers of products and suppliers of services quit producing and supplying as a result of the increased costs attributed to defending their activities, thereby lessening the array of goods and services available in the marketplace. Fourth, fewer and fewer insurance companies consent to write liability coverage in fields most affected by high-damage awards. In those areas where "capacity" (the seller-side of the liability insurance market) remains at all, premium costs and "self-retention" (deductible amounts which remain the responsibility of the insured) increase rapidly, and a poor claims record (even without proven fault on the part of the actor) often means complete unavailability of coverage the next term.

Thus, the common focus lights upon the province of civil law customarily termed "the law of torts."[1] Since this essay seeks to deal with the phenomenon presently receiving such ardent attention, I shall not broaden the scope of my inquiry beyond these common fences. However, it should be noted that the issues and

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errors considered here also permeate other fields of law[2]; the manifestations elsewhere carry an explosive charge quite equal to the current problem in personal injury law.

II. ARE THESE PROBLEMS REAL AND HARMFUL?

Some deny the existence of any "liability crisis." Reflection reveals otherwise. Relatively casual observation demonstrates the existence, significance, and danger arising from the four areas of concern identified above. Indeed, more careful analysis shows that these four clusters of problems penetrate to a much greater depth and cover a much greater breadth than customarily noted by most observers.

A. Increased Litigation

Simple empirical sampling bears witness to a litigation explosion in the United States during the past two decades. More actions are filed each year, employing more singular and curious theories of recovery, and cluttering courtrooms in a manner virtually unknown elsewhere. Increases in population, urban growth, and complexity of society—all common reasons suggested by those who disparage any notion of a litigation explosion—fail to explain the increased litigiousness of the America of today, for the growth of legal activity far outstrips any such putative reasons.

If the growth of litigation could be traced to an increase of legal actions pleading only traditional common law theories of recovery—negligence, assault, breach of contract, conversion, for example—one could draw some conclusions concerning the increased carelessness of society, or a heightened tendency to refuse to keep one's bargains. However, the past score years display a vast increase in legal proceedings employing the judicial system to enforce new "rights" or remedies, based upon newfangled theories of recovery woven out of whole cloth by legislators, administrators, judges, and law professors.

Suddenly, the American court system has become a jousting field upon which every real or perceived slight or mishap becomes a wrong to be righted, with accountability shifted to someone other than the responsible actor, normally someone possessing "a deep pocket" in the parlance of judicial envy. The growth of enforceable personal "rights" cuts across most traditional boundaries of the law, and invades such fields as bodily injury, damage to reputation, dismissal from employment, disclosure of financial risk, refusal of credit, enforcement of common rules and mores of behavior as a precondition to participation, to name but a few. Many now seek to employ the law to adjust all thwarted expectations, no matter how unreasonable those expectations might have been or how unrealistic reliance might appear to the common observer.

The litigation explosion clearly encumbers the judicial system: it burdens the process with too many proceedings to allow inexpensive and expeditious decision. An ancient axiom proposes that "justice delayed is justice denied," for delay means higher cost, less certainty, more frustration, and increased waste.

Nevertheless, if a greater judicial burden represented the sole unpleasant result of an increased caseload, such a burden would constitute a cost which ought to be borne: after all, the legitimate function of government includes the provision of a court of last resort, a peaceful method of solving otherwise insoluble disputes, thereby permitting the inhabitants to get on with their lives and creative endeavors.

In fact, however, the litigation clutter contains much greater evils. First, it represents a state-coerced recovery of verdicts and judgments by some individuals and entities against others for "wrongs" which are not wrong and in vindication of "rights" which are not right; and the recovery, taken from the pocket of one who ought not be held accountable, produces some of the other "unseen" and unlovely results discussed in succeeding sections of this essay. Second, the litigation explosion creates a very real likelihood of "odd man out"; a welter of lawsuits may obscure the true victim, and a perverse fate may decree that deserving Doe may lose his meritorious claim for defamation, malpractice, emotional injury, or the like, while all around him the envious and irresponsible Roes and Moes reap the rewards of large verdicts ultimately paid by innocents. The natural rules of order which govern our tidy little

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universe work their own results upon those who trifle with fundamentals.

B. Extension of Liability and Increase in Damages

The litigation explosion intertwines with a rapid expansion of concepts of liability and a remarkable increase in the size of damage awards. The litigation increase relates to the growth in number of legal proceedings; the extension of liability and increase in damages refers to the number of successful actions and the increasing amounts transferred by legal processes in vindication of "wrongs" and in recognition of "rights."

Again, some observers disparage the contentions of liability extension and damage growth; nonetheless, the favorite explanations of inflated dollars, enhanced population, and increased societal complexity fail to come to grips with reality. By any objective measure, the litigation explosion has produced a by-product of more and higher tort damage awards than ever before. Further, the ricochet effect of expanded liability and exploding damages directly occasions a comparable increase in settlement value in those many cases which never pass through the courthouse door; the courthouse verdict becomes the exemplar for like causes settled before trial.

What aspects of tort law bear witness to this expansion of liability and bloating of verdicts? All elements partake of this change. Traditional legal analysis of civil wrongs compels the plaintiff to plead and prove four factors as a condition to judgment: (1) a duty owed by the defendant to the plaintiff, (2) a breach or violation of that duty, (3) a direct and legally cognizable causal relationship between the breach of that duty and the plaintiff's harm, and (4) damage to the injured party measured in money. The last quarter century or so has observed a remarkable broadening of duties on the part of most defendants, a concomitant diminution of corollary duties owed by plaintiffs, a relaxation of rules of evidence relating to establishment of a necessary causal nexus, and astonishing developments in rules relating to the measure and amount of compensation.

Coupled with a rapid decline in the old-fashioned common law principle requiring the judge to act as a screening tool, to weed out unmeritorious or unrecognized claims at an early and inexpensive stage of the proceedings, the attenuating changes in the four critical elements of tort law account for most of the expansion in the arena of civil wrongs. It remains to highlight a few representative changes in each of these four categories as a framework for understanding the concerns underlying this aspect of "the liability crisis."

(1) Duty. A curious dichotomy afflicts the concept of legal obligation, an aberration which ensures an ever-increasing loss-transfer cost: the duty of the putative tortfeasor or wrongdoer has broadened, while concurrently, the obligation of the plaintiff or victim has decreased.

With nominal variation, the later common law imposed relatively few and straightforward obligations upon individuals and their entities. One could not inflict intentional injury upon another, absent a privilege to repel aggressive action; one was required to keep his solemn contractual promises; one was not permitted to defraud or deceive another and gain from such conduct; and, in the area of careless or unintentional injury, the actor and the victim both were held to the mythical but quite workable standard of the hypothetical reasonable man of ordinary prudence placed in the same or similar context.

This jural code decried prior restraint and preconceived notions and favored unfettered individual creative action. In harmony with companion tenets of theology and moral philosophy, of economics and political theory, it produced a societal framework and individual perspective largely responsible for the flowering of greatness which caused the American Revolution and the American Experiment, and which marked the classical liberal period following 1750 in the English-speaking world. The society which developed was marked by an open texture, resulting not only in peaceable living but also in the greatest outpouring of goods, services, and ideas in recorded history.

Albert Jay Nock argued that the decline of the free society commenced with 1870, the year of his birth. One might well make a case for his point, or for any succeeding year, as the

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retreat from classical liberalism picks up pace. By the time of his autobiographical *Memoirs of a Superfluous Man* in the waning years of World War II, Nock had become a most pessimistic social commentator; yet, one cannot deny that he would declaim even more acidly today, should he be resurrected 40 years later. While the seeds of destruction pre-existed, review and analysis demonstrate that the entire civil fabric of order and obligation has been rent asunder in the past score or two of years. With the sexual, theological, political, and moral revolutions surrounding us, no one should be surprised to learn that the legal system and substance have undergone correlative cataclysms.

The most noteworthy extension of duty affects those who provide the goods, services, and ideas which fuel the march of society: employers, manufacturers, professionals, businessmen, and the like. A notion of enterprise or absolute liability, while purportedly rejected in form by some courts, actually accounts for many increased obligations. Enterprise liability holds that business should bear the "inevitable human costs" of harm, regardless of fault, since business occupies a favorable position from which to diffuse or spread the risk.

Employer liability laws, Workers' Compensation Acts, and industrial safety codes represent early legislative appendages to our jurisprudence resulting from this doctrine. The employer bears the risk and the cost of injury, even where the employee or a fellow worker causes the harm, on the theory that the "business" benefits from the enterprise and "controls" the acts of its employers. Scant attention is paid to the incontrovertible fact that "business" survives (in a market) only as long as it serves a need perceived by its customers; that the employee "benefits" just as much, relatively, from wages and benefits secured without capital investment; and, that "business control" seems a strange sham in the heyday of civil service, compulsory unionism, affirmative action, wage claim acts, anti-discrimination and free access laws, and statutory impediments to reprimand and discharge.

Current legal theory does not restrict the fable of enterprise liability to the employment arena. Indeed, the concept permeates many nooks and crannies. For example, the unspoken premise for the expansion of products liability and premises liability is precisely identical with the doctrine supporting the employer liability laws and Workers' Compensation Acts of the early twentieth century. Again, the rapid development of *respondeat superior* (the master is responsible to third parties for the torts of his servant acting in the course and scope of his employment) rests upon the same grounds. Further, the breadth of duty imposed upon professionals—doctors, dentists, lawyers, accountants, architects, engineers—under the rubric "malpractice liability" or professional negligence, stems from the similar belief that the creative or productive supplier of goods, services, or ideas ought to bear the cost for all manner of harm in any way seemingly related to the production or distribution of the product.

As observed earlier, the courts and legislatures have created and scattered further "rights" and obligations across the legal spectrum: "rights" of access and accommodation, of compulsory association, of employment, of disclosure, of entitlement, of equal treatment and fairness, and others too numerous to mention. While several of these edicts rest upon some of the same unfortunate tenets collected under the talisman "enterprise liability," another notion pervades the area: the leveling concept of envy, the faulty egalitarian premise that mandatory codes of conduct can be concocted and enforced in a manner to coerce all individuals to treat everyone else equally and fairly.

Several factors flaw this program: First, since all human value is subjective and all human choice is moral, the codifiers face an impossible task. Second, since we prize, by lip-service, freedom of thought and association, the egalitarian runs headlong into an insurmountable human barrier. Third, the perversity which follows from toying with natural law ordains that these vain attempts will result in quite unexpected and undesirable results, some of which will be treated in sections II. C, D, hereafter.

Concomitant with the rapid and vast increase of duty upon the creators, producers, and suppliers of society, we observe a decline in the obligation imposed upon those seeking recom-

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pense or surcease.[3] Plaintiffs have become considered helpless wards of the court system, believed to be unable to fend for themselves, employ common sense, or engage in everyday decision-making. The later common law developed the standard defenses of contributory negligence (the contributing carelessness of the injured party), assumption of the risk (the volitional entrance by the plaintiff into dangerous activities) and the fellow servant doctrine (the employer is not liable to employee A for negligent injuries caused by employee B). One by one, these barriers have crumbled, leaving in their wake an attenuated defense of comparative fault (the plaintiff's verdict is reduced by the percentage of his own fault causally related to the harm). In essence, the productive defendant is rendered legally impotent.

What has occasioned this decline in correlative duties of the "victim"? Again, the enterprise liability principle provides solid answers: consumers, users, workers, complainants, small investors, and the like, are viewed as unable to care for themselves and as requiring security and protection. The successful and creative have inherited the obligation to assure security and happiness to all who come into contact with them. Individual accountability has become a dinosaur in the modern age.

(2) Breach. A similar erosion of the concept of a plaintiff-proven breach has occurred in a more silent manner than the expansion of duty. Subtle concepts have wended their way into tort law, slowly obviating the old-fashioned requirement that the complaining party must plead and prove his case. By tiny footsteps, the effective legal burden of persuasion and of proof has shifted to the defendant.

A few examples suffice to make the point. At the outset, various jural concepts lumped under the doctrinal label of "alternative liability" or "market share liability" radically alter time-tested legal fundamentals. In "alternative liability" theory, for instance, an injured plaintiff names all possible defendants in his action, asserts his harm (usually in painful and poignant fashion), and reclines while the court compels the defendants to prove a negative, to justify their particular conduct and nonliability. Entry-level students of philosophy recognize that proof of a negative constitutes an exceedingly difficult task. Couple that logically necessary fact with the natural sympathy evoked by the plight of a single injured person, and the harm incurred by defendants as a result of burden-shifting becomes patent.

"Alternative liability" partakes of several common forms, most likely stemming from an admixture of the ancient English principles of liability for release of ultrahazardous substances and *res ipsa loquitur*[4] and the modern apostasy of enterprise liability. Thus, where a patient anesthetized for surgery suffers an unexpected occurrence or result, the common practice encourages suit against everyone within the realm and range of possibility, with the judicial requirement that the various physicians, nurses, aides, and scrubwomen come forth and explain why they did no wrong. Or, in a famous California case,[5] two hunters fired simultaneously, each striking the victim, with one shell fragment doing much greater harm than the other; both defendants were held liable, since no one could determine which projectile caused the serious injury. In the modern world, where a patient reacts adversely to a drug and cannot identify the manufacturer readily, the law may hold all manufacturers of that particular drug liable for the plaintiff's harm without proof of fault or causation, and prorate the loss among the producers based upon the particular entities' share of the market.

Everlasting liability creates another morass. Conduct which not only violated no duty but also harmonized with the best and the brightest thinking at the time of performance may face sudden and significant challenge years after the deed. For example, use of asbestos in numerous industrial contexts accorded with standard practice years ago; current findings suggest prolonged exposure may cause illness in certain susceptible individuals. A particular employee may have spent his laboring years working for several companies in various industries and in several capacities. Time eradicates records and erases memories. The worker complains of asbestosis (quite often increased by his own voluntary conduct, *e.g.*, use of tobacco or marijuana), sues all employers past and present, and steps aside while those

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charged try to defend conduct long forgotten. Strange legal doctrines, not founded on fault, come to the fore, such as the "last injurious exposure" rule (the employer on whose premises the worker last might have encountered the injury-producing mechanism bears the entire loss) or some prorated diffusion of risk theory akin to market share liability. Changing political and social theories, then, not only effect the creation of new and greater obligations and "rights," but also penalize past actions wholly appropriate at the time of conduct by application of some notion of eternal liability.

Note also that the strange dichotomy considered in the "duty" analysis (higher duties for producers, diminished obligations for users) applies in the breach context as well. The creator, producer, or employer must be virtually prescient as to the development of knowledge far into the future, while the recipient, user, or employee need not possess even the most common fund of knowledge nor take the most rudimentary steps (*e.g.*, first-party insurance coverage) for his own protection and well-being.

Another citadel has fallen, concurrent with the amelioration of plaintiff's obligation to prove breach and the growth of everlasting liability: statutes of limitation and ultimate repose have become marred with well-meaning but ill-conceived distinctions which further deaden the chances of defense. Statutes of limitation impose strict time limits within which to file a lawsuit and serve notice upon defendants. Anglo-American jurisprudence has long recognized that it is to the general good that controversy be resolved promptly and not allowed to fester so as to cause dislocation and civil chaos; fairness also requires prompt notice to the defendant, so that he may ably defend himself before witnesses die, memories fade, and evidence disappears. Legislators have made reasonable exceptions to statutes of limitation for claims by infants and the insane. More recently, however, judges and legislators have invoked a "discovery" rule, granting the plaintiff an extended period of time within which to sue after "discovery" of negligence and harm. While courts declare allegiance to an objective (reasonable prudence) test of discovery, in fact the injured party is held to a minimal standard of "reasonableness." Such a development coincides with growth of everlasting liability to render the defendants' task ever more burdensome.

(3) Causation. Traditional tort law compelled a plaintiff to plead and prove both a direct (cause in fact) and a proximate (legally sufficient) causal relationship between the breach of defendants' duty and the damage suffered by the complainant. Modern legal theory has truncated direct causation and eliminated proximate causation. The result: a lighter burden for the plaintiff and a greater likelihood of a jury verdict against a defendant who ought not bear responsibility.

Man assesses causality poorly. We forecast inaccurately. Mankind also errs in attribution of effect to cause, even with the gift of hindsight: judges, jurors, lawyers, and experts, not to mention witnesses, argue incessantly over the effective cause of an accident or an injury. Even looking back with care in a courtroom setting, assessment of relationship proves fraught with difficulty. Hence, reliance upon a watered-down version of direct cause opens wide the door to abuse and injustice, particularly where the law now requires not only that the cause be merely one of many other direct causes but also that the defendant must anticipate the malevolent, tortious, or even criminal conduct of the unrelated third party which intervenes and affects the outcome. The concept of proximate cause, whatever its inherent ambiguities and defects, at least provided another judicial screen to sort out, at an early date, those matters too remote or tenuous to be countenanced in a reasonable system.

Why does mankind encounter such exceeding difficulty in assessing causal nexus? In part, because of our inherent nature, our finity, our lack of capacity for total knowledge. In part, because of our lack of observation and perception, again hindered both by our fallibility and our perspective and self-interest: every lawyer knows that parties and witnesses tend to put their own position in the best light, to advance their point of view, to shade their testimony (sometimes subconsciously) in self-fulfilling fashion. In part, because causal relationships, particularly those involving human

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action, are incredibly complex given the unique nature of each human being, the vast number of human actors whose conduct interacts, the inability to comprehend all human and nonhuman forces which may intertwine, the "ripple" effect of human decisions where choices do affect succeeding choices of the actor and of many other individuals in an infinite plum tree,[6] and the like.

Next, causation has expanded for substantially similar reasons that duty and breach have expanded, further occasioning the growth of false doctrines favoring loss-transfers to injured persons. Thus, vicarious liability theories impose causal responsibility upon those who act without fault but who possess financial resources (a "deep pocket"). *Respondeat superior* represents a single instance of imposition of accountability upon one (usually an employer) who (1) did nothing wrong and (2) possesses no real control over the acts of the real wrongdoer.

Other examples of vicarious liability abound. A widow operating a small motel acquiesces in importuning by transient woodcutters who offer to top her trees for a fixed price and assure her of their competence; in the course of tree-topping, the workmen drop a limb upon a neighbor and leave; the widow bears responsibility, probably without insurance coverage. Or, a friendly loan of equipment results in injury to the borrower or a third party and a lawsuit against the kindly lender. Or, a doctor or lawyer refers a potential patient or client to another professional more skilled in the needed specialty and the latter makes a mistake; the referring physician or attorney finds his name listed as a defendant on a summons.

Furthermore, the law has created greatly extended duties upon many of us to "warn" others of risks and results of action and nonaction. A concomitant effect: further attenuation in the proof of causation and the encouragement of a great fiction that most individuals can and will read and heed. For example, drug manufacturers must warn of all manner of problems which may arise upon ingesting a drug or receiving a vaccine. In most instances, contraindications require many pages of fine print. Even a comprehensive litany of possible adverse reactions is truly useless precisely because we are unique individuals living in an incredibly complex world; in other words, warnings of all potential risk resides beyond the capacity of mere finite men for the identical reasons that causation is so difficult to predict by foresight or to assess by hindsight.

Moreover, the law now requires warnings of great detail upon such common devices as knives and ladders. These mandated warnings often could paper the entire product. Again, as in the duty and breach analyses, the plaintiff, the employee, the user, is presumed to lack even an iota of a common fund of knowledge or good sense. Indeed, the rules have become so silly that, in some instances, a perfectly good and complete warning or disclaimer has been challenged not upon content but upon *location:* a court decides, after the fact, that the warning in paragraph 7 was sufficiently important that it should have appeared in paragraph 2. And, since no two of us think or act alike, the next judge may relegate the warning to paragraph 19! To cap it all off, it is idle to assume that (1) most people can read, (2) most people will read, and (3) most people will change their course of conduct, even with the appearance of a hypothetical "objectively perfect" warning!

(4) Damage. No less a revolution has taken place in the extent and proof of damage awards for personal injury. Once again, after a brief preface, several examples selected from a great array will prove the point.

The common law recognized three categories of damage: special, general, and punitive (exemplary). Special damages normally compensate an injured party for out-of-pocket losses: medical, hospital, drug, and therapy bills; lost wages; and the like. General damages constitute an attempt to measure physical, mental, and emotional loss and future inspecific harm by monetary value: hence, an injured person may recover for lost opportunities or injury to his reputation emanating from slander; for emotional scars and stress resulting from proscribed discrimination; or, for the infamous "future pain and suffering" and loss of earning capacity stemming from a careless automobile accident or a botched surgery. Punitive damages represent a civil penalty (beyond any actual loss) awarded by the law to the injured

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party, designed not to replace the plaintiff in his proper position from which the act of the defendant removed him, but to deter outrageous or socially undesirable conduct. Except in the unusual case governed by precise statutory or contractual language, the victorious party does not recover his reasonable attorneys' fees as damages.

Proof of "damage" has become a fine art in the skilled hands of plaintiffs' counsel and compliant "experts." By the time the parties reach the courtroom, the natural sympathy exuded by all of us for the unfortunate may be intensified by clever before-and-after portraits of the victim. Evidentiary rules concerning expert testimony have washed away, permitting all manner of academicians and "experts" to work econometric alchemy by charts, graphs, and incantations, premised upon highly unlikely assumptions, all purporting to demonstrate that an injury may be translated into a very substantial dollar loss.

The development of these norms has been quite one-sided: for example, in many jurisdictions, the defense may not inform the jury that any general damage award is non-taxable; the plaintiff freely implies that he is starving and penniless, while the law forbids the defense from demonstrating the existence of "collateral source" income (*e.g.*, payments received by the plaintiff under private first-party insurance coverage, Social Security, various other legislative programs, trust funds, and the like); the forensic economist indulges in the fiction of eternal celibacy for a widowed surviving spouse as a necessary part of his concocted statistics, while the defense may not prove a pending or existing remarriage or substitute relationship; the expert assumes prudence in investment and moderation in life when he calculates damages, while the jury remains ignorant of the true-life spendthrift nature of the injured party.

A further doctrine feeding the increase of damage awards may be uncovered in the heightened use of punitive damage judgments in all manner of cases. In earlier years, a claim for exemplary damages consituted a most extraordinary occurrence; it is now commonplace in the most simple and harmless of cases. The law ought not command overpayment to the plaintiff; to do so infringes upon the province of the criminal court and produces extreme asset transfers based upon passion instead of good sense. Human beings act much too liberally with other people's money; when they receive free reign to "punish" conduct which they subjectively believe to be "wrong" only mischief can result. Judges and jurors freely award millions in sympathy and anger, yet those same citizens would not contribute a moment of time nor a dollar from their pocket to the "hapless victim."[7]

An additional jural element plagues the realm of damage awards: the traditional concept of "joint and several liability." Simply put, this doctrine provides that if plaintiff sues D_1, D_2, and D_3 for her harm, and the jury finds the plaintiff blameless, D_1 responsible for 75 per cent of the injury, D_2 responsible for 20 per cent, and D_3 responsible for only 5 per cent of the loss, the plaintiff may collect the full amount of her judgment against any one of the three defendants, regardless of the size of their contribution of actual fault.[8] As it happens, D_1 and D_2 may be missing or insolvent, so D_3 must bear an inordinate burden—and, quite often, D_3 may be so far removed from reasonable accountability that he would have prevailed in the absence of the extensions of duty, breach, and causation considered heretofore. Few, if any, jurors recognize this twist in the law and one might surmise that they imposed a five per cent finding of fault upon D_3 as an afterthought, a mistake, or a poorly conceived "message" *sans* real consideration of right and wrong.

Bankruptcy statutes provide one additional ingredient worthy of note. In recent years, some manufacturers and other "target" defendants faced with a large number of potentially ruinous claims have sought the shield of bankruptcy, insolvency, and other debtor-protective laws in an attempt to keep the business afloat and to ameliorate or spread the loss. A growing legal trend denies full and equal protection to these penitents, apparently founded upon the politics of envy. A libertarian cannot readily accept bankruptcy codes in a world of pristine purity; however, denial of equal access on the basis of wealth or productivity certainly constitutes a discrimination as vile as others for

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which mankind receives regular chidings these days.

C. Outmigration and Market Disarray

The unprecedented extension of liability causes all manner of producers, professionals, and providers to leave the market. By nature and necessity, development and innovation in providing goods, services, and ideas bring risk, and entrepreneurs constitute exceptional risk-takers. A portion of a producer's return compensates him for the risk incurred, just as other profits reward him for his knowledge, his innovation, his diligence, and his foresight.

Some entrepreneurs develop enterprises by diffusing the risk of the venture, thereby partially insulating each individual from the full effects of the most likely costs. The limited liability afforded by law to limited partnerships and corporations provides one common mode: each venturer takes "a piece of the action" but limits his potential loss to the amount of the investment. Another redoubtable protection developed in the Sixteenth Century: insurance and reinsurance against specified liabilities or casualties. In essence, the insurance carrier assumes some of the risks of a venture in exchange for a premium, a price calculated upon a forecast of danger premised on human action and history. The decline in insurance capacity is considered hereafter in Section II. D.

When traditional methods of risk diffusion disappear, or when the penalties employed impose unanticipated and seemingly random risks upon the productive, or when the extent of liability exceeds the reasonable expectation of return, the entrepreneur abandons the market and employs his capital, knowledge, and skill elsewhere, in a place where he can achieve "more bang for his buck." These results are taking place currently across the country, in increasing fashion.

Once again, some naysayers dispute the accuracy of this contention of dislocation. Both empirical and rational evidence support the thesis, however, although human beings do encounter difficulty in assessing causality and perceiving historical events occurring before their very eyes; it seems to be a human failing to comprehend essential cause-and-effect relationships and significant principles of human action much more cogently from a distance in time.

Nonetheless, observation offers proof. The increase in duty and damage, and the concomitant amelioration of breach and causality, render it increasingly difficult to anticipate risk and plan accordingly. With certainty and prediction, the provident provider can foresee dangers and spread the risk; in a random world, no man functions with any modicum of efficiency, and fear and frustration soon cause him to give up altogether; after all, life is too short for the creative to abide by the disharmony of the litigatory society. Again, the cost of risk diffusion in an accelerating world of liability may become sufficiently great so as to price the product or the service out of the market, thus depriving the non-litigant consumer of his full range of choice. Finally, the risk-spreading activity of the liability and casualty insurance industry may be significantly deterred in like manner, drying up that avenue of protection.

Thus, proof abounds for the perceptive observer. For example, in medicine, specialists curtail or terminate lucrative and otherwise satisfying practices early, and dissuade their offspring from the profession. Successful corporations find no one willing to serve as an outside director. Quality legal and accounting firms refuse specific "dangerous" kinds of practice. Manufacturers close out profitable lines as a preventive measure. Inventors and investors restrain research and development of new drugs, or machines, or processes, while their foreign counterparts—unhindered by any "liability crisis"—forge ahead and build new enterprises based upon creativity and innovation. Employers fear recrimination so much that they accept the "lowest common denominator" resulting from an inability to manage, penalize, and discharge, with the necessary outcome of shoddy work, poor service, and bad ideas. The list goes on, like a disharmonious version of an unchained melody. In essence, the wheels of production have been grinding to a slow but sure halt for some years: we are, and have been, living for decades upon the largess of relatively unfettered creative action and sacrifice of our ancestors.

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THE BETTMANN ARCHIVE

The Subscription Room at Lloyd's.

Astute observers, like Frederic Bastiat and Henry Hazlitt, have taught us to seek both "the seen and the unseen." Their exhortation deserves attention. One might cry out, "what's one surgeon (or druggist, or lawyer, or piece of machinery, or antibiotic) more or less? We enjoy a surfeit of such provisions, and others will take their place. No one is indispensable!" Unfortunately, two things occur, both distasteful: first, the replacements tend to be less skillful, caring, and creative, since individuals of highest character and caliber tend to comprehend the natural rules of order most astutely and to adjust to disagreeable circumstances most quickly; second, after a while no replacements will exist, as the problem intensifies and a distended State, vainly attempting to cope with the current "crisis," does all the wrong things at the wrong times.

Whatever one's personal view of the moral issue, relatively few contraceptive devices or drugs remain on the market today, compared to a decade ago. The few remaining manufacturers of "DTP" vaccine (which has saved millions of children from suffocating death) have raised the price three-fold, with no end in sight. Employers refrain from hiring workmen who exhibit the slightest precondition to illness or injury, fearing the possible catastrophic consequences to that individual, his fellow workers, the consumer, and the business if the pre-existing condition becomes manifest in a manner which occasions a major or a minor misfortune. Hence, the obvious consequence of "the liability crisis" in this regard might be characterized as a "market shake-out," whereby creators and producers concerned with cost and loss abandon the enterprise for less risky ventures; the deeper "unseen" consequences involve a great misallocation of resources and contravention of the subjective desires of the buying public, a grand attempt to avoid risk and achieve everlasting security, and an eventual destruction of the market, a route which guarantees the most risky and least secure existence possible.

D. A Crisis in Capacity

Insurance developed as a market response to the need for risk diffusion in the late Middle Ages. A thriving trade depended upon the carriage of goods by sea, and the sea proved to be a dangerous and sometimes whimsical adversary. The merchants whose vessels survived storm and piracy enjoyed great profits; the traders whose goods perished (often along with the crew) suffered financial calamity. Entrepreneurs who frequented Lloyd's Coffee House on London mornings devised a plan of selling shares in ocean-going ventures, pledging personal assets in syndicated fashion so as to share gains and spread losses. From this unstructured beginning arose an industry which has provided

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a method of risk diffusion sufficiently malleable and effective to permit adventurous mankind to break out of the ordinary barriers imposed by the possibility of catastrophic loss. By the twentieth century, myriad modifications allowed most individuals and entities to insure against all kinds of ordinary dangers involving liability or casualty (*e.g.*, death, personal injury, fire, theft, earthquake, litigation, and the like), not to mention life, health, and disability risks.

No legitimate question may be raised concerning the decline of capacity, or the ready availability of liability insurance. Insurers depart the market in droves as a result of the litigation and liability explosion, either directly (through insolvency or bankruptcy) or indirectly (by means of a business judgment designed to avoid insolvency, bankruptcy, or untoward and unrewarded risk).

Private insurers stay in business only to earn a profit. Profit emanates from two primary sources: premium income and investment income. In many special lines of liability coverage, the industry pays out $1.40 or more each year for each $1.00 of premium income received. Astute investments have enabled some companies to survive this aberration in the short-haul, but few of us possess sufficient charitable traits to continue losing money on the premium side of the equation. Hence, insurers leave the field, either redeploying assets elsewhere or dropping entire lines of coverage.

Statists exacerbate the situation by decreeing that all insurers must accept certain heightened risks (*e.g.*, assigned risk pools for automobile liability coverage) and must not "discriminate" even if the private carriers' choice rests upon sound reason.[9] To make matters worse, the usual collection of demagogues harangue for edicts preventing insurers from leaving the field and for rules prohibiting non-renewal of policies at expiration "without cause" (and, guess who defines "cause").

While the litigation expansion affects all fields of life and law, the primary assault has penetrated "special lines" or "long tail lines" of liability insurance, the type of coverage normally employed to protect against the risks of tort claims, *e.g.*, professional malpractice, product liability, and the like. Properly used, liability insurance provides a regulating and planning device for avoiding risk and encouraging commercial market transactions. This function rests upon reasonable predictability and stability; in a free society, one by-product is lower cost coupled with greater certainty.

Liability insurance represents a promise to pay in the future upon the occurrence of a certain event, for example, upon a bodily injury for which the insured must bear legal responsibility. The farther out into the future one proceeds, the more difficult it becomes to predict such matters as changes in the law, alteration of societal values, the expected standards of business and professional performance, and the like. Yet, special lines of insurance often have a long "tail" of some eight to ten years out from the date of receipt of premium, which compounds the effects of errors in prediction: a premium is paid and the term is set in year one, yet the manifestation of harm and the resultant litigation may not occur until year five, or eight, or ten.

Risk aversion has been greatly complicated by expanding and increasing uncertainty in the law. The analysis in Section II.B. has provided a cursory overview of some of these jural modifications which have intensified the problems of certainty and predictability for insurer and insured alike. In summary, some of the leading components of uncertainty include (1) the growth of expectation of risk protection at all levels of society; (2) highly variable actual monetary inflation with the "ripple" effect that this variability causes both in velocity of exchange and in future predictions; (3) unprecedented and unanticipated changes in standards of expected performance, leading to unanticipated claims five, eight, or ten years in the future; (4) wholly unpredictable legislative and judicial changes regarding insurance policy interpretation as well as elements of proof and content of duty; (5) the escalation of legal fees, and concomitant costs of decision-making, on the part of both prosecution and defense of tort cases; and (6) a social inflation which includes a tendency to employ insurance products to solve all "social ills" perceived by various elements of society but actually unrelated to the insuring agreement.

Loss of certainty and predictability, coupled

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with actual loss on premium dollars, explains the decision of many insurers to curtail unproductive and risky lines of coverage and to allocate investment assets elsewhere. Indeed, these decisions partake of the same elements as those which affect the outmigration of producers and providers discussed in the preceding Section II.C. The two elements intertwine: the insurer departs from the market or raises its premium and restricts its coverage in reaction to the litigation and liability explosion, thereby causing the seller's side of the market to shrink; the insured professional, producer, or provider faces restricted coverage, rapidly increased premium costs, and a reduction in choice as a buyer of the insurance product; thus, the aspects discussed in Section II.C. encourage top producers to depart from the buyer's side of the market, a tendency which merely intensifies the parallel phenomenon afflicting the seller's side. The result: market disarray and shrinkage, deprivation of choice, and a decline in the satisfaction enjoyed in a free society.

III. CAUSES OF THE CRISIS

Many commentators have offered flawed theories concerning the cause of "the liability crisis." Few have looked beyond the apparent to seek the real. An abundance of demagoguery persists, with fingers pointed at insurers, attorneys, litigants, and the judicial system. A quick view of these imagined "causes" ought to dispel any notion concerning their validity, and should lay the groundwork for insight into the true cause and its results.

A. Four Imagined Causes

The insurance industry provides an obvious scapegoat. Carriers suffer losses, raise premiums, reduce coverage, act selectively, and sometimes depart from the field altogether. To the demagogue, these commonplace market actions violate his ardent and ancient economic fables, so he assigns fault accordingly.

Insurance traducers flay their victims with allegations of "excess" or "windfall" profits in an era of constant loss, ignoring the truism that, in a market, a profit deserves no adjective inasmuch as it represents the increment of value beyond cost placed upon the good or service by the voluntary purchaser. Similarly, the anti-insurance lobby rails at carriers for making poor investment decisions, and subsumes some odd sort of unfairness if the carrier increases premiums to cover such losses; the successful insurer, to the contrary, has made prudent investment decisions over the past several years, and this prudence has enabled some companies to remain in business at a time when premium dollar income has proven woefully inadequate to cover claims losses. In any event, in a market, the insurer may charge what the buyer wishes to pay for a risk diffusion service, and motive plays no role.

A related attack challenges the power of a carrier to cancel a poor risk, or to fail to renew for whatever reason; this challenge rests upon some obdurate notion of anti-discrimination or inherent unfairness. The position is inherently inconsistent: should the insurer be forced to maintain its relationship at the same premium level forever upon entry into a contract despite changes in time or circumstances, and no matter if the contract expires after a specified term? Would the insured endure the same enslavement, or would he possess the absolute right to shop for a better deal and cancel at any time? How can logic justify different treatment in this context?

Finally, critics shriek "conspiracy" among the myriad competitors in a highly fragmented industry, supposing that hundreds of insurance companies band together to "fix prices" and restrict the market. One can assume that if a lucrative market existed on the capacity side, new carriers would enter the field promptly. Thus, the contention that the insurance industry has caused "the liability crisis" comes up wanting.

Lawyers also receive their share of opprobrium. The public views the bar as an overcrowded and avaricious profession, diligently fomenting lawsuits and inveigling otherwise decent citizens into improper and foolish actions. This surmise overlooks the independent character and downright stubbornness of most citizens; very few Americans betray their basic principles at the importuning of another, and no attorney can proceed without a client.

Those who consider lawyers to be menda-

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cious troublemakers often assail the contingent fee as a causative factor in producing the "crisis." In a contingent fee arrangement, the client in a bodily injury action agrees to pay the costs normally associated with preparation and trial of his case except for the attorney's fee; the attorney agrees to take the case "on a contingency," and shares in any settlement or verdict, receiving nothing for his time and effort in a losing cause. While some Codes of Professional Responsibility abhor the practice, in many cases the attorney also advances substantial costs of the lawsuit, particularly in payment of "expert witnesses" (who also may be serving on a contingency) and other trial preparation expenses.

Unfortunately, the attack upon the contingent fee is an attack upon the freedom to contract; in addition, since the contingent fee does not cause the problem, the attack constitutes wasted effort which incidentally wounds liberty. One might disparage the contingent fee as unwise insofar as the lawyer becomes a subjective participant with a "piece of the action" instead of an objective advocate, but those who enter such a bargain are better able to determine their subjective desires than is some lofty codifier apart from the fray.

A better rule, and one adopted in a number of English-speaking provinces, would require the lawsuit loser to pay a reasonable attorneys fee to the successful party; in addition, where the plaintiff (upon filing) does not display financial stability which would enable him to discharge such an obligation (which may exceed $100,000 in a critical case) the law might require the plaintiff to post a bond or to secure guarantors for the potential debt. Indeed, a lawyer truly wedded to a contingent fee case might be willing to stand as surety and place his or her assets behind the cause.

A third body of opinion lays blame at the feet of litigants on one or both sides of the aisle. Some chide defendants as careless and uncaring; others contend that plaintiffs are greedy and lazy. Parties in most actions are individuals, singly or banded together, who partake of the same human condition as the rest of us: no better, no worse, just mill-run folks trying to live as disorderly creatures in an orderly world. To some extent, then, the proponents of this position are correct: "the liability crisis" results from human failings, but those frailties are poorly understood, as demonstrated in Section III.B., *infra*.

Finally, the judicial system comes in for its raps. Judges, jurors, legislators, bureaucrats, lobbyists, and all manner of individuals related to the justice system and the political apparatus receive their forty lashes from particular parties to the debate. One could comment upon the lost courage of judges who, in a common law system, ought to exercise a screening function, just as one may decry the tendency of juries to liberally and carelessly disburse other people's money in a grand display of envy and spite. Legislators and their bureaucratic aides have created a whole new universe of "rights" which are not right and which compound existing wrongs. Indeed, of all the imagined causes, the "system" may be at fault in the normative sense but, as with the litigants, challenge to the "system" proves to be rather meaningless camouflage. In final analysis, our juridical system mirrors society, albeit with a warped mirror reminiscent of our days in the carnival fun house.

B. The Cause and Its Results

(1) Cause. Results often flow from the application of deceptively simple causes. This general rule applies to "the liability crisis": the effects decried result from a noteworthy human frailty, the inability or unwillingness of each of us to make fine distinctions and to live consistent lives. Inconsistency and discord mar mankind and constitute a portion of the human condition; in the present context, this discrepancy causes each of us to place impossibly high standards upon our opponents while imposing nominal obligations upon ourselves. Thus, a doctor or a manufacturer or an employer is required to exercise superhuman efforts to insure safe and pleasant results, while a patient, a user, or an employee need exercise but minimal care and foresight.

Proper positive law provides necessary general rules for peaceful resolution of human disputes, general rules of conduct patterned, insofar as is possible, upon the natural law of order and obligation, of cause and conse-

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quence, which undergirds our universe. The aforementioned refusal to make and abide by fine distinctions warps these general rules, with each participant seeking to create an exception for his cause all the while pinning his adversary to the strict stanchion of the law. This tendency is analogous to the advocate of freedom who attempts to rationalize trade barriers, subsidies, or market entry restrictions in the "special case" of his industry or enterprise. No difference exists between the subsidy-seeker and the litigant who argues for extended liability, attenuated concepts of breach and causation, and expanded damages.

The siren songs of egalitarianism, entitlement, and enterprise liability (fed by the unlovely and all-too-human traits of greed, envy, and jealousy) pander to this quest for exception, this establishment of multiple standards which mocks any semblance of "equality before the law." Redistributionist theories of wealth transfer and codified attempts to enforce an unclear and unattainable "fairness" coincide to justify legalized theft as a balm to thwarted but unrealistic expectations: it seems foolish to expect perfection of others if we do not seek it for ourselves, yet the modern legal "progressives" turn the Golden Rule of Jesus Christ and the Silver Rule of Immanuel Kant ("Act only on that maxim through which you can at the same time will that it should become a universal law.") upon their respective noggins.

The lack of consistent conduct and ideological sensibility displays another facet: the rapid decline in personal accountability. Responsibility requires the actor to accept the consequences of his conduct without a whimper; it does not permit him to shunt the untoward results of his acts and errors unto the unwilling shoulders of another.[10] Nonetheless, while most individuals profess a love for personal freedom, few are willing to live with the results of their own errors, or the pitfalls naturally afflicting a disorderly man in an orderly universe, or the consequences of the interplay of human action where each party merely performs as an ordinary fallible human being. Coupled with the innate difficulty of comprehending causality and long-term effects, this tendency produces a "beggar-my-neighbor" legal system where Bastiat's metaphor of a circle of pickpockets applies most assiduously!

(2) Effects. Thus far, I have alluded to myriad results of this cause in providing descriptive examples for textual statements. Examples are not exhaustive; they serve to identify and to provoke, not to end the discussion. A few highlights, some of them redundant, may provide useful illustrations of a long-range disquieting consequence already set in motion by "the liability crisis."

First, insurance carriers no longer enjoy the right of selective underwriting, a right which ought to exist under any reasonable concept of freedom of contract, and one which permits the channeling of conduct into safer modes. The current trend of assigned risk pools, aggressive state regulation, statutory limitation upon nonrenewals, and sibling ideologies, render the insurer impotent to freely choose the least risky enterprise to insure and thus encourage care in a free society. Actuaries err, as do we all, but fundamental freedom and the basic rules of human action dictate that the channeling function can be performed only in a market.

Second, over the long haul, efficient business becomes inefficient business and, absent the reversal of things in motion, commerce will eventually grind to a halt. The law has become a schizophrenic intruder: no way exists to harmonize the competing codified mandates of reduced risk, diminished price, increased "regulation" and higher wage, let alone "egalitarianism," "anti-discrimination," "procompetitive," and "fundamental fairness" rules, except in a market system; the very existence of these infernal and vexatious norms dooms any notion of freedom. As a result, managers can't manage, owners lose the right to control the fruits of their labor, sloppiness, shoddiness and false swearing become the rule of the day, and the well-intentioned but poorly-conceived laws designed to promote safety, well-being, and plenty produce just the opposite results. Even those nominally principled persons, who would abide by general rules of good behavior in many instances, renounce principle and join the throng to milk the system; after all, why pay for something that is free?

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Third, greed and envy translated into high verdicts for faultless conduct penalize the unprotected innocent. The "odd man out" poses a very real concern. More poignantly, the consumer or employee who wishes to accept a nominal risk is denied his opportunity where the costs of litigation cause producers to leave the market or products to disappear. Suppose a wonder drug or vaccine allegedly causes death or injury to one patient in one million; the resulting litigation forces all manufacturers to withdraw the compound; who cries for the 999,999 individuals who wish to take the drug, whatever the risk, in order to avoid death or crippling disease?

Fourth, the disintegration of accountability causes manifestations far beyond the scope of this essay. Loss of responsibility afflicts us all in realms of economics, politics, law, theology, philosophy, education, indeed in any discipline of pertinence. Certainly, self-responsibility declines when those who smoke tobacco, imbibe alcohol, or eat ice cream to excess complain of, and recover for, allegedly resultant lung, liver, or lipid disease. It disappears when a worker refuses to purchase first-party coverage, spends his paycheck as he desires, suffers an injury or loss, assigns the cause without reason to a covered entity, and enjoys—free—the benefits his fellows have paid for voluntarily over the years. Strangely, those who bleat most loudly about "social justice" ignore the pervasive injustice necessarily and eternally flowing from their bad ideas and worse acts.

IV. THE CRISIS CAN BE CURED

Complex problems do not always yield easy answers, particularly when those problems stem from pervasive assumptions which are just plain wrong. In the present case, the solution to "the liability crisis" is clear: an application of increasingly large doses of liberty; the methodology of the application is complex, given the human trait of avoidance of responsibility.

Self-responsible people, accountable people, free people have neither the time nor the inclination for needless lawsuits. Pettiness and bickering mark the slave society, not the free society, where men and women solve most of their interpersonal problems short of access to a court of last resort. Thus, "the liability crisis" will be ameliorated by the release of creative human action. Those who seek to extend liability and increase damage verdicts by employing the legal process to impose impossible or tyrannical obligations upon others do so out of a fear of accountability for their own actions, a belief that someone else must pay their way. These false ideologies—entitlement, egalitarianism, and enterprise liability—can only bring gloom.

What premises underlie the free society? The basic principles include a commitment to personal freedom, individual responsibility, a market economy, respect for private property, and limited government, all designed to unfetter individual energy in the creative realm. Rational, empirical, moral, and theological proofs demonstrate beyond cavil that human problems are always solved more quickly, fairly and appropriately in a state of relative liberty.

Many of the proposed "solutions" suggested by commentators and lobbyists interested in "the liability crisis" partake of government regulation and Draconian limitation: "caps" (limitations) on general damages, restrictions on contingent fee arrangements, mandatory state insurance pools, increased regulation of the insurance industry, elimination of selective underwriting, and a host of others. Such barriers to market entry accomplish nothing but exacerbation of problems. The press worthy panjandrums of the day iterate "bold new solutions" which, upon examination, turn out to be the same failed socialism of the past: increased regulation, expanded codes of prior restraint, and other innate foolishness.

One might accept a few of the nominal suggestions put forth from some quarters: elimination of punitive damages; obliteration of joint and several liability for unrelated defendants; revival of a judicial screen designed to prevent a tyranny of the majority; an award of attorneys fees to the victor to be paid by the loser; and the like. But these band-aids will not staunch the hemorrhage. Free man deserves and requires an open textured legal system: a few fundamental rules of good conduct quickly and ably en-

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forced, fully understood by all members of society, restraining destructive action: positive norms forbidding and penalizing the aggressive use of force against another; barring deceitful and fraudulent conduct; requiring adherence to freely entered contracts; affording a mechanism for the resolution of otherwise insoluble disputes which invariably arise amongst the citizenry; and permitting the orderly construction and continuance of the necessary governmental apparatus to carry out these few important functions. No state has adequately discharged these necessary functions; how could we expect such a flawed entity to perform well in channeling creative human endeavor?

Suppose that my thesis is correct, that the so-called "liability crisis" is merely one of many manifestations of an all-encompassing liberty crisis which detrimentally afflicts every aspect of our lives. How then do we implement the solution?

The answer resides within each of us. Each individual in society must learn to act consistently with principle, make fine distinctions, exercise the restraint mandated by self-government, and continue on his never-ending quest for knowledge and propriety. Leonard Read's truism concerning the ultimate effects of the loss of a belief in accountability finds a ready home in this regard: personal freedom cannot exist without individual responsibility, and unless we wish to live in a ring of pickpockets—or worse—the recapture of liberty is imperative.[11] Vigilance commands us to look within for the seeds of destruction which take root without: for example, those who create exceptions for themselves cause consequences far beyond the perimeters of their immediate action; those who torture new meanings into "force," "fraud," and "duty," occasion a rippling loss of liberty for us all.

Note well that "the liability crisis" will not disappear in a puff of smoke even in the wake of that highly improbable event, the immediate development of a free society. All too many individuals prove to be summer soldiers, leaving the standard of freedom when personal problems beset them, or when they mistakenly assess causality and assign a villain's role to the free society, or when radical and rapid improvement does not take place before their very eyes. We lose liberty by miles, regain it by inches, and our recapture must be painfully slow as a result of our imperfect rational processes.

The analysis in this paper and the solution to "the liability crisis" presents nothing novel: our betters of the past have offered like solutions, to like problems, employing like principles. Unfortunately, a lesson forgotten is a lesson unlearned; it is mankind's misfortune that each of us must relearn the lessons of the past. □

1. "Tort," in the legal lexicon, refers to a civil injury to a person, his reputation, or his property done by another. Traditionally, our common law of torts dealt with intentional and unintentional wrongs, the former often also constituting a crime punishable by the state, the latter premised upon a lack of ordinary prudence in carrying out one's everyday affairs. The very causes which will be considered hereafter have resulted in a blurring of these traditional distinctions and an increased haziness of these fundamental concepts.

2. For one example, the law of contracts has long accepted Romanist modifications which obviate the need for each man to abide by his solemn word (of course consent obtained by duress or deceit does not constitute consent at all, and forms quite a different inquiry). The current expansion of the "ameliorating" contractual defenses of "mistake," "impossibility," "commercial frustration ," "commercial unreasonableness," and the like, create an analogical quagmire resembling the mess in tort law. Other examples abound in such disparate fields as securities issuance and regulation, antitrust barriers to market activity, employment rights and remedies, and the like.

3. One should recognize that an individual or entity may, at different times or at the same time, fall within both broad categories. Human inconsistency being what it is, the same party may display the same categorical tendencies in each position, demonstrating a curious legal and moral schizophrenia.

4. *Res ipsa loquitur* means, literally, "the thing speaks for itself." It was employed in the later common law where a plaintiff suffered injury by means of an instrumentality controlled by a defendant, although the plaintiff could not identify the actual breach of duty and causal nexus.

5. *Summers v. Tice*, 33 Cal 2d 80, 191 P2d 1 (1948); *compare Restatement* (Second) of Torts § 433B. *Contra: Anderson v. Maloney*. 111 Or 84, 225 P 318 (1924).

6. Ex. 20:5, 34:7; Deut. 5:9.

7. This circumstance resembles the wealthy Senator who wildly taxes and spends his constituents' hard-earned funds for grandiose schemes beloved by the lawmaker—but not so much favored that he would support them voluntarily by his personal contribution!

8. In most states, some juridical idea of contribution among joint tortfeasors and/or indemnity exists. The rules in this regard are so diverse and complicated that further discussion would serve no useful purpose. In the example—an all-too-perfect portrait of the real world—a right to indemnity or to contribution by D3 would afford small solace where D1 and D2 are insolvent.

9. For example, the District of Columbia has recently decreed that health insurers cannot exclude carriers of AIDS virus from coverage. Or, insurers may not recognize inherent actuarial male/female distinctions. Mere recitation of governmental nonsense approaches infinity.

10. Ridgway K. Foley, Jr., "Individual Responsibility," 26 *Freeman* (No. 1) 42-51 (January 1976).

11. Ridgway K. Foley, Jr., "On Recapturing Liberty," 29 Freeman (No. 5) 304-14 (May 1979).

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Rousseau's "Social Contract": A Critical Response

by Bobby Taylor

Political theorists have long attempted to find a plausible rationale for the existence of the coercive State. This quest reached a climax during the Enlightenment when philosophers and political scientists rejoiced over the discovery of a new model depicting the relationship between the individual and the State: the social contract.

According to the theory of the social contract, individuals may leave an anarchic "state of nature" by voluntarily transferring some of their personal rights to the "community" in return for security of life and property. A seemingly rational and practical concept in its general form, the social contract theory began to lose its luster as its proponents clashed over what form the State should take and what rights, if any, the individual should retain.

During this period of intense conflict, French philosopher Jean Jacques Rousseau produced a seminal work entitled "The Social Contract." In it Rousseau proposes a visionary society in which all rights and property would be vested in the State, which would be under the direct control of "the People." Large meetings of the public would be held in order to determine the collective interest as perceived by the "general will"; this the State would then dutifully enforce. Rousseau justifies this strange synthesis of communism and direct democracy by arguing that the abrogation of individual rights would abolish special privileges, and that tyranny would be impossible because the People would never oppress themselves.

"The Social Contract" has been used by both democrats and totalitarians to support their respective positions. This ambiguity is rather symptomatic of the contradictions underlying Rousseau's entire essay. His work is particularly vulnerable in three essential areas: the formulation of the "general will," the subordination of individual rights, and the validity of the "social contract" concept.

The term "general will" seemingly implies that there is an interest common to all persons involved. But even if this were true, running a direct democracy on this principle would be hopelessly impractical. Rousseau, after building a heady image of united purpose and brotherhood among the masses, finally admits the impracticality later in the essay and provides a slightly less demanding criterion: majority rule.

By accepting this annotation, however, Rousseau deviates from his position that the People would never oppress themselves. History has clearly shown that majoritarianism without constraints, such as the Bill of Rights, leads to oppression of the minority and State confiscation on a vast scale. The only legitimate conception of the "general will" that would satisfy Rousseau's great expectations is complete unanimity, and if it could ever be reached in a large body of self-interested individuals, why would the coercive State be needed at all?

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Jean Jacques Rousseau
1712-1778

"Whoever ventures to undertake the founding of a nation should feel himself capable of changing human nature, so to speak, of transforming each individual, who by himself is a perfect and separate whole, into a part of a greater whole, from which that individual receives all or part of his life and his being; of changing the constitution of man in order to fortify it; of substituting a partial and moral existence for the physical and independent existence that we have all received from Nature. In a word, he must be able to deprive man of his own powers in order to give him those that are foreign to him. . . ."

—*from* The Social Contract

Rousseau believes that personal liberty need not be secured since the individual would in a sense rule himself via the "general will." As we have seen, however, Rousseau's conception of the "general will" is an inadequate safeguard against tyranny, and in reality the individual citizen would be incessantly victimized by the State. This monstrous miscalculation on Rousseau's part stems from his regard of human beings as means to higher ends, rather than as ends in themselves. His utter disregard for the rights of man runs directly counter to traditional Western individualism and leaves his ideal society suspended in a sterile moral vacuum.

Finally, Rousseau maintains that the State may exercise complete control over the lives and property of its citizens because these individuals have granted it this right by virtue of the social contract. The term "social contract" works to legitimize actions normally considered to be enslavement and theft, and at first glance the concept seems rather reasonable. Upon further reflection, however, an important question arises: Is the social contract really a contract at all?

Where Rousseau Fails

Contracts by definition must have two basic features: they must be entered into voluntarily and they must also clearly enumerate the rights and duties of the parties involved. Rousseau's social contract fails miserably on both points.

The social contract is ostensibly voluntary, but any individual refusing to enter into the contract would be forced to flee by the State and would have his land confiscated, though he had not initiated force against anyone. Additionally, the terms of the contract are extraordinarily vague: the contracting individual agrees to grant his precious life, liberty, and property to the State in return for one ineffectual vote in the formulation of a governing but extremely faulty "general will." This so-called contract is actually the epitome of the one-way street: the State receives everything yet grants nothing and therefore holds all the cards. The fact that no contract even faintly resembling Rousseau's has ever appeared in the free market is ample proof that such an agreement would never be accepted by anyone—except, perhaps, at the point of a gun.

Although "The Social Contract" is a blatantly anti-libertarian document, it should be read and studied closely by all students of the free society. In Rousseau's work one can discover the roots of contemporary socialism and can see the mass of contradictions and fallacies underlying this morally bankrupt ideology, unobstructed by the clever rhetorical devices of modern collectivists. The principles espoused by Rousseau in his essay haunt us even today, and until they are finally faced, the specter of tyranny will continue to hang like a pall over the Western conscience. □

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The Irish Potato Famine

by Teresa R. Johnson

Every year from 1845 to 1851 a deadly blight attacked Ireland's potato crop, causing severe famine. About a million people died and at least a million others emigrated. Historians offer various explanations of how such massive suffering could have occurred in a province of Great Britain, then the richest nation in the world. Although their explanations vary, most historians insist that if the British government had abandoned free market principles, few, if any, Irish people would have died. Yet evidence shows that free market principles did not increase the suffering of the Irish, but, rather, alleviated much of the misery that the famine caused.

It is not my purpose to determine the reasons for Ireland's distress. I do intend to show, however, that free market economics did not murder a million Irish people, despite what many historians say. I will present a brief history of the tenant-farmers, the people who suffered most during the famine. Next, I will demonstrate that the British government did not consistently uphold free market principles. I will then discuss how free enterprise reduced the effects of the famine. First, however, I will show how a few historians describe the impact of free market principles on Ireland's misery.

Some historians who favor government intervention suggest that the British leaders were caught up in forces beyond their control. For example, Kevin Nowlan writes: "The history of the great famine does not sustain a charge of deliberate cruelty and malice against those governing, but it is a chastening story of how fashions in social and economic ideas and human limitations can combine to increase the sufferings of people." (p. 133). Likewise, Thomas O'Neill says of Parliament, "The fetish of free trade had tied their hands" (p. 257). Yet those who would make such statements blame the system of free market economics without acknowledging that Parliament did not strictly follow that system and without mentioning that the Irish people bore some responsibility for their own situation.

Lawrence McCaffrey is one historian who explicitly condemns Parliament for supporting free enterprise. Whereas Nowlan refrains from charging the British leaders with deliberate cruelty, McCaffrey compares them to the Nazis. Likening the famine-stricken Irish to the Jews in Nazi Germany, McCaffrey says that both groups suffered "ideological murder." He continues,

> Certainly the Nazis were more ruthless, heartless, and consistent in the application of racist principles than Trevelyan and his colleagues were in enforcing the dogmas of political economy. But an Irishman dying of hunger or crowded into the bowels of an emigrant ship in the 1840's would have had scant consolation in knowing that his predicament was not the result of race hate, but the price he must pay to maintain a free enterprise economy. (p. 66)

McCaffrey admits that Ireland's situation was complex, and he censures those Irishmen who see the prejudice of Englishmen as the cause of all Ireland's misery. Yet he oversimplifies the situation by placing all the blame on Parliament for adhering to free market principles.

Background: Irish Tenant-Farmers

The situation of Irish tenant-farmers explains how the failure of a single crop could devastate an entire country. Since most of the farmland in Ireland belonged to a few wealthy English and Irish landowners, the majority of the Irish agricultural population did not own land and had to trade their labor for the use of a dwelling and a

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THE BETTMANN ARCHIVE

Peasantry seizing the potato crop of an evicted tenant.

garden plot. Although some of these tenant-farmers paid rent by raising and selling a pig, many worked in their landlords' fields of oats, rye, or other grains. For their own families they planted only potatoes, which cost little and yielded more food per acre than most other crops (Woodham-Smith, p. 35). Also, potatoes thrived on this rented land: ground unfit for the landowners' grain or animals (Green, p. 103).

For most rural laborers, then, their potato crop was the only source of food. Tenant-farmers lived in constant danger of famine, not only because they depended upon a single article of food, but also because the potato "in its very nature [is] peculiarly liable to fail in certain seasons" (O'Brien, p. 223). The crisis that began in 1845 was not Ireland's first potato famine. An 1851 census reported that the potato crop had failed in some degree at least 24 times since 1739 (Woodham-Smith, p. 38). Every summer more than two million people went hungry until the new crop came in (Woodham-Smith, p. 165). So the failure of the potato crop yearly from 1845 to 1851 greatly increased the misery of a country already burdened by extreme poverty.

Although historians emphasize Parliament's free market stance, the best way to describe the British economy of 1845 is that it was a fusion of free market principles and certain governmental interventionist measures. Parliament's critics assert that free market policies increased the ill effects of the famine. Yet evidence shows that government intervention in the form of the corn laws, the navigation laws, and the poor laws intensified Ireland's difficulties.

When the potato crop failed, Parliament adhered to free market principles by refusing to close Ireland's ports. Critics insist that Parliament should have prevented the export of other crops, arguing that the Irish people should have benefited from Irish produce. However, not only did those crops rightfully belong to the landowners, they were also needed to feed English laborers (O'Neill, p. 257). If Parliament had closed Irish ports, famine, rather than being prevented, would have been transferred from Ireland to England. The suggestion that the government buy Ireland's produce and distribute it among the Irish would have solved the problem of paying the landlords (Woodham-Smith, p. 75), but not the problem of feeding the English laborers.

Yet the corn laws and the navigation laws show that Parliament was less dedicated to the free market than many historians would indi-

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cate (O'Brien, pp. 265-6). The corn laws, passed to protect British agriculture, kept the price of grain artificially high by imposing tariffs on imported grain. The navigation laws protected the British shipping industry. Under these laws, only British ships could carry goods into British ports.

Such protectionist measures worked against both the English laborer and the Irish tenant-farmer. The corn laws increased the price that the English laborers paid for food. And while thousands of Irishmen were dying of starvation, food that private societies in the United States had sent to distribute to the Irish could not go directly to Ireland. It first had to be transferred to a British ship, increasing the cost of aiding the needy and lengthening the time that starving people had to do without food (O'Brien, p. 266). The combination of the corn laws and the navigation laws made it unprofitable for foreign markets to sell grain to English or Irish markets.

Only after the famine had continued for several months did Parliament finally repeal these protectionist measures (O'Brien, p. 249). With the repeal of the corn laws in January 1846, American grain was bought to sell in Ireland, thus providing food that the Irish desperately needed. A year later the repeal of the navigation laws allowed donations from foreign countries to enter Ireland freely.

The poor laws provide additional examples of government intervention in Ireland. These attempts to legislate charity were met with disapproval on all sides. Landlords opposed the bills because property taxes funded the provisions for the poor (O'Brien, p. 187). The poor despised the workhouses, which were the major provision for aid under the laws, because of the hideous conditions at those institutions. In many of the workhouses prison-like discipline was enforced; in others, overcrowding and a lack of discipline allowed immorality to go unchecked. Some parents decided that it was better for their families to remain hungry than to live among such immoral conditions (O'Neill, p. 250).

Therefore, the belief that Ireland suffered because of Parliament's dedication to free market economy is wrong on two counts: First, in practice, Parliament was not completely dedicated to the free market, as evidenced by its willingness to retain protectionist laws and to legislate charity. Second, when the market was finally made freer by the repeal of two protectionist measures, both the Irish and the English benefited.

Direct Government Aid

The huge amount of government aid given to Ireland during the famine is further evidence that Parliament did not strictly follow free enterprise principles. In fact, Britain spent £8,000,000 on famine relief in the first year alone (McCaffrey, p. 65). Initially, Parliament provided the Irish tenant-farmers with public employment so that they could earn money to buy grain, which Parliament imported from the United States.

Parliament's public works system was, for the most part, an exercise in futility. Since the government had stipulated that the works should not benefit any individual, most of the work involved building roads, many of which led "from nowhere to nowhere" (Woodham-Smith, p. 166). Some of the road work was so badly managed that it bordered on vandalism: "The roads of Ireland were ruined. . . . Distances which were formerly driven in about an hour and a half . . . now took four hours, and accidents were frequent" (Woodham-Smith, p. 166). Because wage payment was often delayed for several weeks, some workers died of starvation. Thomas O'Neill relates that "Denis McKennedy of Caharagh, co. Cork, who died on October 24 on the roadside, was employed by the board of works up to the day of his death and was owed wages for a fortnight" (p. 229). Another serious problem with the public works was that many people were on the payroll who did not really need help (O'Brien, p. 253).

Before the spring of 1847, it became evident that the public works system had not fulfilled its purpose (O'Neill, p. 234). And the worst of the famine had not yet occurred. Whereas blight had ruined only a portion of the 1845 potato crop, it destroyed the entire 1846 crop. By July 1847, so many Irishmen had died of starvation and related diseases that the British government began its second phase of famine relief: distributing free food. These direct

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handouts also defied the free market policies that historians say Parliament upheld religiously.

The Free Market in Ireland

A study of the government food distribution in July 1847 provides evidence that free enterprise aided Ireland. Although the northern counties depended upon agriculture almost as much as the western counties (Green, p. 89), less than 20 per cent of the population in the north took advantage of the government's offer of free food, whereas in some western counties as much as 100 per cent of the population received free food (O'Neill, p. 242). Ireland's only thriving manufacture, the linen industry, made the difference for the north (McDowell, p. 14). Because of this industry, many people in the north had a secure source of income and, thus, could buy food instead of relying on government aid. The linen factories, which in 1850 employed almost 20,000 people (O'Brien, p. 327), did not provide the only opportunities for spinners and weavers. Northern tenant-farmers could earn money by producing linen at home (McDowell, p. 15).

The "balanced economy" that the linen industry provided the north gave those counties many benefits that the rest of the country did not enjoy (Green, p. 122). In most of the other counties virtually all transactions took place by barter; money was practically unknown. Since more capital was available in the north, most vendors, including food merchants, were also there. Even where food was available in other parts of the country, the lack of jobs and of capital prevented the destitute tenant-farmers from buying that food.

In most accounts of the famine years, historians say little about private relief efforts, preferring to discuss government aid to Ireland. Yet private charity, which is a vital part of a free market economy, kept vast numbers of Irishmen alive (O'Brien, pp. 247–8). Such charity was of two basic forms: contributing food or money, or providing work.

Several organizations world-wide sent donations almost immediately upon hearing of the famine. The first contributions came from Irishmen who served in the Queen's troops in India (Woodham-Smith, p. 156). Many donations of food and money came from Irish-American organizations. But the Society of Friends (the Quakers) offered the most consistent aid in the early famine years. In November of 1846 they formed the Central Relief Committee in Dublin, which worked closely with a similar committee in London (Woodham-Smith, p. 157). After surveying the situation in Ireland, they decided that the most immediate need was to set up food distribution sites throughout the country. Their soup kitchens were so successful that Parliament used them as a model for its food distribution program (O'Neill, pp. 235–6).

Once the immediate crisis ended in a particular area, the Quakers attempted to stimulate the local economy by helping the Irishmen to earn a living. In 1847, at the height of the famine, they distributed turnip seeds to farmers who could not afford seed. The resulting crop was so bountiful that the Central Relief Committee decided to continue the program (Woodham-Smith, p. 286). They later bought and operated a farm in Galway county to develop and to demonstrate improved agricultural methods (O'Neill, p. 258).

The Quakers also aided the Irish fisheries. Since bad weather often prevented Irish fishermen from going out to sea, they normally relied upon potatoes for food when they could not fish. When the potato crop failed, many fishermen pawned their boats and tackle in order to buy food. The Quakers, through local committees, lent the fishermen enough money to redeem their equipment (Woodham-Smith, p. 292). In the community of Arklow alone, more than 160 families survived because of these loans (Woodham-Smith, p. 292). The Quakers also set up new fishing stations in the western counties of Galway and Mayo and in the southern county of Cork (Woodham-Smith, pp. 292–3).

A private relief effort that historians generally overlook is the establishment of lace-making as a cottage industry. The lace-making centers were concentrated mainly in the northern and extreme southern regions of the country. Convents ran most of the lace-making schools in the south, while wealthy ladies sponsored the schools that opened in northern

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Ireland. The lace industry began mainly because many of the poor women strongly desired to work (Wardle, p. 187). Not wishing to rely on government aid, they asked only for a way to provide for their families. Those who sponsored the lace schools offered exactly that: they trained and equipped the destitute women to make lace, and in many cases they volunteered to find English buyers for the finished product.

Many women who opened lace schools had to perform the tedious job of unravelling an existing piece of lace in order to find out how it was made. They would teach the method to a few women, who would then teach others (Wardle, p. 178). They soon learned to concentrate on making the most time-efficient kinds of lace. And because crochet work can be done faster than most traditional lace methods, some of the schools developed crochet patterns that imitated lace (Feldman, p. 90).

The cottage industry that grew out of these efforts did more than provide money to buy food; it reunited many families (Wardle, p. 197). According to Mrs. Susannah Meredith, a proprietor of one of the lace schools, several children who had gone to lace-making schools when their parents had been forced to enter a workhouse could soon earn enough money to feed their families. Once the family was back together, other members learned the trade and increased the family income. The ability to earn a productive living inspired the workers with hope and maintained the dignity that handouts can sometimes destroy.

Conclusion

Neither a relatively free market nor government relief programs kept many Irish people from suffering greatly. Ireland's problems had been years in the making; they could not be solved overnight. Yet the urgent needs created by the potato crop failure required overnight solutions. To blame free enterprise for not providing those solutions is to ignore the complexity of Ireland's situation.

Free enterprise, while it did not save every Irishman, did not increase the suffering that occurred in Ireland in the mid-1800s. In fact, Parliament's move toward freeing the economy by repealing the corn laws and the navigation laws alleviated much of the suffering in Ireland. And in northern Ireland, where the linen industry had raised the standard of living, the people suffered less and relied less on government aid. Furthermore, private charity saved the lives of countless Irish tenant-farmers, worked to improve local economies, and started a cottage industry that provided employment for many Irish women through the rest of the century.

Lawrence McCaffrey, after maligning free enterprise, grudgingly admits that it allowed the Irish immigrants in the United States to prosper: "They lived in a country with social mobility and economic opportunity. American capitalism might be vicious, but it provided . . . possibilities for wealth" (p. 81). Such a backhanded compliment obscures the fact that free enterprise in both Great Britain and the United States helped the Irish people. Millions of Irishmen before, during, and after the great famine were willing to risk the difficult passage to the United States so they could take advantage of the opportunities that "vicious American capitalism" offered.

We need to be aware of this "vicious" tendency to interpret history so that free enterprise is seen as a villain. Those who oppose the free enterprise of the past are those who would insist that government intervention is the only way to eliminate the poverty that exists today. But government aid, in today's America as in yesterday's Ireland, is at best ineffective, and at worst damaging to those who are supposed to benefit by it. The American welfare system has failed just as Parliament's attempts to aid Ireland failed. □

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The Sagebrush Rebellion

by Douglas E. Wentz

Artemisia tridentata
common sagebrush

In a flurry of recent magazine and newspaper articles, authors across the country have criticized attempts by federal, state, and local governments to sell or to lease public lands for private development.[1] The "Sagebrush Rebellion," or the movement to encourage the privatization of western public lands, has been characterized as a deceitful attempt by vested interests to channel public treasure into private pockets. At risk, say groups of leading environmentalists, are the nation's parks and wilderness lands, if not the very air we breathe and water we drink.

In response to such criticisms, Reagan Administration officials and others involved in the Sagebrush movement generally have relied upon cold facts and "fiscal responsibility" to support their case. It is noted, for example, that Uncle Sam's vast holdings, covering 727 million acres or about one-third of the nation's land area, seem more than adequate to allow both the sale of selected properties and the preservation of park and wilderness lands.[2] Moreover, it is estimated that the sale by the federal government of certain properties, such as the 1774 acres at the entrance to the Golden Gate Bridge in San Francisco (that currently is being used, free of charge, by a private golf club), could raise in excess of $17 billion in revenue, providing substantial and badly needed funds in the fight to lower the national debt.[3]

There is, however, a second and perhaps more fundamental reason for supporting those who encourage the privatization of western public lands. In the context of a common property resource such as a body of water or a wilderness forest, it often is private ownership, and not government regulation, that best assures the maintenance of favorable environmental conditions. Indeed, from both an economic *and* an environmental standpoint, private ownership can produce incentives to preserve property for the long term, while government regulation can and has produced inefficiencies that are both frightening and real.

As an example to illustrate this point, let us consider the case of the Bristol Bay area of central Alaska, location of one of the richest runs of sockeye, or red, salmon in the world. Over the course of many years, American fisherman drew ever increasing catches from the waters of the bay until, by 1950, the salmon run had declined markedly. The Alaskan government, in an attempt to reverse the trend, set about to regulate virtually every aspect of the salmon fishing industry, and administrative rules governing fishing hours, boats, and gear increased in complexity until today they can be summarized as follows:

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BRISTOL BAY AREA—
SALMON FISHERY REGULATIONS

1. Fishing Seasons: May 1 to September 30.
2. Fishing Periods: 9:00 a.m. Monday until 9:00 a.m. Friday or Saturday, depending on the fishing district.
3. Gear: Set and drift gill nets in most districts.
4. Gill net specifications:
   (a) Gill net mesh may not be less than 6¾ inches through 9:00 a.m. June 16 and not less than 4½ inches after 9:00 a.m. July 15 in one district, with different rules for different districts.
   (b) Gill nets not more than 29 full meshes in depth.
   (c) Drift gill nets not exceed 150 fathoms in length or set gill nets exceed 50 fathoms.
   (d) Maximum drift gill net on vessel not exceed 150 fathoms.
   (e) Individual allowed two set gill nets.
   (f) Operation of gill net only by person in whose name it is registered.
   (g) Set gill nets shall be operated in substantially a straight line.
   (h) etc.
5. Identification of Gear:
   (a) Bright red flag or buoy required at the end of each drift gill net, marked with vessel license number.
   (b) When using set gill net, a marker must be placed above the high tide line directly inshore of the net.
   (c) etc.
6. Minimum Distance Between Units of Gear: varies by district.
7. Vessel Specifications & Operations: maximum length 32 feet.
8. Vessel Identification: License plate with symbols at least 12 inches high.
9. Closed waters: various areas at different times.
10. Registration and Re-Registration:
    (a) Must register for a specific district.
    (b) Cannot change to another district before 24 hours after re-registration.
    (c) [Further rules on hours and locations of local representatives.]
11. Landing requirements: All salmon must be landed in the district from which taken.

Not unexpectedly, the impact of these regulations was immediate and direct. Today, Alaska's fishermen generally are poor, both because they are forced to use small boats and inefficient equipment, and because they can fish only a small fraction of the time and only then in designated areas. American consumers, for their part, pay an unusually high price for salmon, a price much higher than that which would be charged if efficient fishing methods were permitted. And Alaska taxpayers, of course, bear the cost of creating and enforcing their state's myriad regulations.

And what about the salmon runs the Alaskan government's regulations presumably were designed to protect? Ironically, rather than thriving, the salmon runs have continued to decline, and it is not difficult to understand why. Under the current non-ownership arrangement, no individual fisherman is particularly concerned with the preservation of the salmon run. In fact, given the current state of affairs, the incentives are quite the opposite! The fisherman's best interests are served by catching as many fish as possible during any one season.

This of course contrasts sharply with the result that would be obtained if the Bristol Bay were privately held. In this case, the fisherman/owner would have not one but two goals: to use the most efficient technology to catch salmon at the least cost, *and* to permit enough salmon to survive to perpetuate the runs. The owner would be encouraged to act in a manner that is both economically "efficient" and environmentally sound.

The analogy, of course, is not limited to salmon runs and bodies of water. Some of this nation's greatest forests, for example, already are owned or are leased by large, responsible companies such as the Weyerhaeuser Company which each year spends hundreds of thousands of dollars not only to harvest timber, but also to plant young trees for future generations. In such cases, the government's sale of surplus timberland has assured the survival of the very forests that opponents of privatization have sought to protect.

As the above examples show, it is not necessarily destructive of environmental goals to support the privatization of public lands. Quite to the contrary, in many cases only private ownership can create the incentives necessary to produce a result that is both economically efficient and environmentally sound. □

1. *E.g.*, Bruce Hamilton and Brooks Yeager, "Paradise Leased," *Sierra* 81: 38-43 (March/April 1986); George Reiger, "Sagebrush Rebellion III," *Field & Stream* 90: 29-30 (July 1985).
2. Randy Fitzgerald, "Uncle Sam's Surplus Land Scandal," *Reader's Digest*, 128: 33-36 (January 1986).
3. See Fitzgerald.
4. State of Alaska Administrative Code, Title 5, Chapter 6 (Bristol Bay Area), Art. 3 (5 AAC 06.001 - 5 AAC 06.990).

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A REVIEWER'S NOTEBOOK

Land of Opportunity

by John Chamberlain

Donald Lambro, who has written some excellent books about Washington as "fat city," believes in statistics. So, in his latest work, *Land of Opportunity—The Entrepreneurial Spirit in America* (Boston: Little, Brown, 176 pp., $17.95) he parades the figures about new jobs and new companies that have made the six years of Ronald Reagan's "supply side" presidency so exciting. From 1983 through 1985, some 600,000 new companies were created each year. A total of 11 million new jobs were accounted for in the three-year span. The total labor force stood at 109 million, the highest ever. Unemployment had fallen from 10 per cent in 1982 to 7.1 per cent in 1985. The interest rate had been cut in half from the 21 per cent of 1980, and the rate of inflation had dropped from the 10.4 per cent of 1981 to 3.2 in 1983.

The really important thing about Lambro's book is that the author is so curious about the human faces behind the statistics. What manner of people were responsible for so many new enterprises and new jobs? It wasn't the *Fortune* 500, the big companies that John Kenneth Galbraith believed were about to take over the country. They are getting along with fewer and fewer employees. It has been the "little people" who are primarily responsible for thousands of new enterprises that specialize in unique services. Instead of one "ladder industry" lifting the country up, as happened in the days of the railroad and automobile tycoons, it is a case of thousands of small stepladders.

"The rags-to-riches stories," says Lambro, "are at once endlessly fascinating, infectious, and inspiring to all who seek to emulate them and create a successful, prosperous enterprise of their own . . . they come forth in seemingly inexhaustible numbers, people of all ages and from all classes, native Americans and immigrants, millionaires and paupers, young and old, to write their names across the sign boards of new industries and new enterprises, big and small."

The first remarkable example cited by Lambro is Frederick W. Smith. In the mid-sixties, when he was an undergraduate at Yale, Smith wrote a paper for an economics class outlining his idea for a company that would provide next-day delivery service across 3,000 miles of country for letters and packages that "positively have to be there overnight." The professor gave Smith a "C" on his paper. When Smith formed his company in the seventies at the age of 27, he lost $29 million in the first two years of operation. This was in the period of high energy prices. The Yale professor might have smirked for a moment, but Smith proceeded to get an "A" in practical life when his company grossed $1.4 billion in revenues in 1984, earning $115 million in post-tax profits from the delivery of 450,000 packages and letters a night for a fee of $11 per item.

Lambro is fascinated by the character of Joel Hyatt, a graduate of Dartmouth and the Yale Law School who, in the spirit of the sixties, had only disdain for businessmen. Hyatt's father had been unhappy in his own business career in umbrellas. Imbued with the idea of "service," Hyatt looked for a way to help that large segment of the public that was afraid of lawyers and didn't know where to go for legal

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services. With his wife Susan, Hyatt founded Hyatt Legal Services in Cleveland to target the 70 per cent of the people who were worried about excessive legal fees.

The response of the public made Hyatt an entrepreneur in spite of himself. He appeared on television to sell his services to the masses, ending each spot with the promise, "You've got my word for it." Thus he joined a stream of mass medium entrepreneurs that includes Maryland's chicken salesman Frank Perdue, who talks in an ordinary voice to his customers directly.

Other Success Stories

From Hyatt, Lambro jumps to a cookbook author named David Liederman, an ex-lawyer who took a job as a chef in a French restaurant in preparation for starting his David's Cookies, with more than 130 stores in the U.S. and abroad. Liederman has eschewed dependence on high-priced marketing researchers. Instead, he goes directly to children for opinions about his product. His 4-year-old daughter and her friends were the "experts" who were called upon to pass on David's macadamia, chocolate chunk confections.

Colonel Sanders and his Kentucky Fried Chicken are an old story. The Sanders success has inspired people who have nothing to do with the food business. Al Sutherland, a retired insurance salesman, was asked by his son to take care of his home during a vacation. After a few periods of house sitting, Sutherland told himself, "If chicken can have Colonel Sanders, house sitting can have me." Sutherland now franchises his Home Sitting Service for a minimum fee of $6,000 for a city of 100,000 population.

Lambro goes on to tell how Morris Siegel built a big company on his wife's herbal tea. His Celestial Seasonings now produces twenty-seven varieties of herbal tea and has branched out into herbal shampoo and conditioners. He refuses to install time clocks for his more than 200 employees.

Space doesn't permit me to recite more of Lambro's stories of "little people" who have started successful businesses. It's a cornucopia that Lambro offers. □

DECISION AT PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787

by Christopher Collier and James Lincoln Collier

Random House-Reader's Digest, 201 E. 50th St., New York, NY · 331 pages, $19.95 cloth

Reviewed by Robert M. Thornton

Ten years ago we celebrated the 200th anniversary of the Declaration of Independence in a spirited if not intellectual fashion. One hopes for a proper celebration in 1987 but I doubt there will be one because there is little "glamour" or excitement connected with constitution making. In contrast to revolutions it is a dull affair—dozens of questions to be asked, studied, debated, and voted upon.

Many compromises were necessary to write a constitution which would be acceptable to the fifty-five participants and the voters of the thirteen colonies. Each general subject opened the door to specifics. There were the issues of slavery, foreign and interstate trade, voting, the chief executive, congress, judiciary, armed forces, foreign affairs, national/state relations —the list is almost endless.

Perhaps the greatest problem for all the men in attendance was the challenge to form a government strong enough to enforce laws but not strong enough to become tyrannical. What developed was a system of checks and balances and a separation of powers to prevent any part of government from dominating the others.

The authors of this very readable volume set the scene for The Grand Convention and offer biographical sketches of the major participants —Washington, Madison, Hamilton, Sherman, the Pinckneys, Gouverneur Morris, Edmund Randolph, Elbridge Gerry and others. Most were influential, prominent and well-to-do; many were lawyers. There was a great variety in their personalities and characters, but all were independent thinkers. They labored to produce a constitution which would contain government within proper bounds, as befits a free people.

Two points stand out: first, these were men willing to split their differences; they were not

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ideologues who would concede nothing. If these men had not made mutual concessions there would have been no Constitution and probably no United States of America as we know it today. The document is imperfect, of course, like everything in life. Second, the men at the Constitutional Convention understood human nature. As the book points out:

"The Constitution, beyond all else, was forged in the heat of human emotion. In the end it reflected, for good or ill, the human spirit. It worked because it was made by human beings for the use of human beings, not as we might wish them to be, but as they really were."

The Constitution of the United States was made flexible on purpose. To have spelled out everything in detail would have been to draw up a document that would have been outdated in a few years. Brilliant men put together the Constitution, but none is so wise as to foresee the future. What we need to recapture is the spirit and intent of the Founding Fathers whose love of liberty underlay their remarkable work during a long, hot summer 200 years ago. □

(Mr. Thornton resides in Lakeside Park, Kentucky.)

THE ECONOMICS OF TIME AND IGNORANCE

by Gerald P. O'Driscoll and Mario J. Rizzo

New York University Press, 562 W. 113th Street, New York, NY 10025 · 1985 · 261 pages, $34.95 cloth

Reviewed by Richard Ebeling

Austrian Economics, born a little more than a century ago, has always been "dynamic" and process-oriented in its approach. It has focused on man as actor and doer; it has emphasized the imperfection of human knowledge and the pervasive uncertainty surrounding human choice; it has analyzed the market as a rivalrous competition through which the plans of market participants are brought into harmony; and it has drawn attention to the problem of how market and social institutions emerge and evolve over time out of the actions of many people without anyone planning their development.

A new generation of Austrian economists is taking the field and a series of important books and articles is flowing from their pens. One of these is *The Economics of Time and Ignorance* by Gerald P. O'Driscoll and Mario J. Rizzo. The first five chapters, devoted to subjectivism, knowledge, time, and uncertainty, are a frontal attack on the predominant view among economists that human choice and action should be analyzed as if they were nothing more than applications of mathematics and Newtonian mechanics to a particular problem, i.e., man as decision-maker in the social world.

The authors argue that man is something more than a particle of matter moving through space along a geometric time axis. Man is a creative being who imagines and makes his future in unexpected and unpredictable ways. As a result, man's future is inherently unknowable because its direction and path only emerge out of the actions of individuals as they are confronted with new and unanticipated opportunities and obstacles.

Such things as uncertainty and possibility cannot be reduced to statistical probability alone; to be able to do so would imply that the knowledge that will emerge only through time can be known before it is experienced. Replacing the standard mathematical view of market equilibrium used by most economists with a concept of dynamic market coordination through time, O'Driscoll and Rizzo develop an analysis of how agents come to anticipate each other's behavior in terms of patterns or types of human activity that become institutionalized in the market order.

The remaining four chapters apply these insights to the problems of competition; monopoly and government policy; capital and production in the market order; money and the business cycle. The central theme is Hayek's idea that the market order should be viewed as a dynamic and never-ending discovery process for the dissemination and acquisition of knowledge and information needed for harmonizing the multitude of human plans being worked out under the social division of labor. In this context, the authors criticize the standard theories of competition and monopoly and demonstrate

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the harmful and perverse effects of government regulation, intervention, and control.

The chapter on capital theory (written by Roger Garrison) lucidly outlines the nature and complexity of the production process in a developed market economy and how both the uses of capital and the rate of interest emerge out of the choices and preferences of the market participants. The crucial and delicate nature of the production process then serves as the background for O'Driscoll and Rizzo to explain the role of money in facilitating the smooth working of the intricate web of market relationships and to explain how monetary manipulation can distort market price signals and bring about a business cycle.

The Economics of Time and Ignorance both continues within and goes beyond the past contributions of the Austrian School. Its original and thought-provoking quality demonstrates just how alive and vibrant the Austrian tradition remains in economics. The book is a challenge and a standard for mainstream and Austrian economists alike. □

(Richard Ebeling is assistant professor of economics at the University of Dallas, Irving, Texas.)

POVERTY AND WEALTH: THE CHRISTIAN DEBATE OVER CAPITALISM
by Ronald H. Nash

Crossway Books, 9825 W. Roosevelt Road, Westchester, Illinois 60153 · 1986 · 223 pages, $8.95 paperback

Reviewed by Richard A. White

Good intentions divorced from sound economic theory can produce disastrous consequences, and, according to Professor Ronald Nash, this is precisely the trouble with ecclesiastical pronouncements on social issues.

Nash approaches economics almost exclusively from the Austrian free market perspective, expounding such basic tenets as marginal utility, opportunity cost, and supply and demand. His chapter on value provides a fine critique of cost of production theories and stresses the importance of the subjective theory—the theory that individual preferences determine the economic value of a good, not the quantity of labor it took to produce it. Nash is quick to point out, however, that "The price of an economic good reflects the extent to which individuals desire it; and this is something quite apart from the question of how desirable it is." Subjective economic value does not exclude the possibility of objective moral precepts.

After explaining the basic operation of the market, Nash describes the unworkability of socialism. Relying on the early work of Ludwig von Mises, Nash demonstrates the impossibility of "rational" economic calculation in a socialist society. He criticizes "liberation theologians" for their futile attempt to synthesize Christianity with Marxism, concluding that their program is neither liberating nor theological.

In a later chapter, Nash discusses the biblical view of money and wealth. "Since the world is God's creation," he writes, "and since God placed us in such a close relationship to the material world, the creation and use of wealth is a perfectly proper activity." Wealth is good, but as a means to other ends and not as an end in itself. Private ownership is necessary for the practice of Christian stewardship and the biblical requirement of private charity. The Bible in no way sanctions the redistributionist policies of the modern state. Prosperity is better than poverty in God's material world, and the free market economy is the way to prosperity. But the market cannot thrive in a spiritual vacuum, nor in the absence of biblical standards of morality.

Nash provides an excellent introduction to free market economics within a biblical framework, as well as a penetrating and cogent study of liberation theology. In a day when socialist ideas are creeping into seminary classrooms and many church pulpits, Nash's *Poverty and Wealth: The Christian Debate Over Capitalism* is especially welcome. □

(Richard White is a first-year student at Trinity Evangelical Divinity School, Deerfield, Illinois.)

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The ideal of freedom is to let anyone do anything he pleases, as long as his behavior is peaceful, with government empowered to keep the peace—and nothing more. An ideal objective, true, but one that must be pursued if we would halt the continuing descent of our society from bad to worse. Nothing short of this will suffice. And unless we fully understand the ideal—and what makes for its attainment—we'll tend to settle for powerless, futile little pushes and shoves that yield no more than a false sense of something done.

—Leonard E. Read

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A free life is the only life worthy of a human being. That which is not free is not responsible, and that which is not responsible is not moral. In other words, freedom is the condition of morality.

—THOMAS DAVIDSON
1840–1900

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